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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

JAMES MASSA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED*

1. Whether a court of appeals may conclude that the admission of evidence in violation of a defendant's Sixth Amendment Confrontation Clause rights is "harmless error" without evaluating the effect of that evidence on the jury in contravention of the stringent federal harmless error standard of *Kotteakos* v. *United States*, 328 U.S. 750 (1946), particularly where the remaining evidence was entirely circumstantial.

2. Whether the court of appeals below erred when, in direct conflict with authority from the Second Circuit, it approved a jury instruction concerning a defendant's "willful blindness" that did not instruct the jury to acquit the defendant if the jury accepted the defendant's testimony that he actually believed that nothing illegal was occurring.

3. Whether the sale-of-business exception to the securities laws requires dismissal of an indictment that purports to charge fraud in connection with purchases of securities under 15 U.S.C. § 78j(b) because the indictment alleges that through the purchases at issue the defendant obtained and exercised control over the company.**

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* Petitioner is an individual. Duane Skinner also was a defendant in the district court and an appellant in the court of appeals.

** This Court recently has granted certiorari in two cases that present for review in a civil context the "sale-of-business" exception. *Landreth Timber Co.* v. *Landreth*, 53 U.S.L.W. 3365 (U.S. Nov. 13, 1984) (No. 83-1961); *Gould* v. *Ruefenacht*, 53 U.S.L.W. (U.S. Nov. 13, 1984) (No. 84-165). This is the first case, however, to present this issue in the context of a criminal prosecution.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner James Massa prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this cause.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a) is reported at 740 F.2d 629 (8th Cir. 1984). The judgment order of the United States District Court for the Eastern District of Missouri, which was entered upon a jury verdict, is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 1984, and a timely petition for rehearing was denied on October 2, 1984 (App. B, *infra*, 35a). On November 26, 1984, Justice Blackmun extended the time in which to file this Petition for a Writ of Certiorari to and including December 28, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provisions of the following constitutional amendment and statutes are set forth in Appendix C: the Sixth Amendment to the United States Constitution; 18 U.S.C. §§ 2, 371, 1341, and 1343; 15 U.S.C. §§ 78j(b), 78q(a), and 78ff; 28 U.S.C. § 2111; and Federal Rule of Criminal Procedure 12(b) (App. C, *infra*, 36a).

STATEMENT OF THE CASE

1. Introduction.

On December 14, 1982, a forty-three count indictment was returned in the United States District Court for the Eastern District of Missouri against Petitioner James Massa and co-defendants Arthur Miller, Jr. and Duane Skinner. Count One of the indictment charged all three defendants under 18 U.S.C. § 371 of conspiring to commit a number of offenses against the laws of the United States together with unindicted co-conspirators Thomas Brimberry, Jerry S. Maeras and unknown others. The essence of the offense charged in Count One is a scheme on the part of petitioner, Brimberry, Miller, Skinner, and Maeras to obtain large sums of money fraudulently from Stix & Co. (Stix), a St. Louis stock brokerage firm, by altering internal Stix business records relating to customer accounts they controlled to increase the apparent equity value of

those accounts. The apparent increase in equity in the accounts allegedly enabled the conspirators to withdraw substantial amounts of money from the accounts. In addition, the conspirators allegedly combined to conceal the receipt of this money to impede the Internal Revenue Service's (IRS) determination of the proper federal income taxes due and owing (Superceding Indictment, Count 1).

The indictment further charged petitioner with the following substantive offenses, all allegedly done in furtherance of the scheme to "loot" Stix alleged in Count One: nine separate counts of mail fraud in violation of 18 U.S.C. §§ 1341 and 2; six counts of wire fraud in violation of 18 U.S.C. §§ 1343 and 2; five counts of employing manipulative and deceptive devices and contrivances in the purchase of Stix stock in violation of 15 U.S.C. §§ 78j(b) and 78ff, and 18 U.S.C. § 2, by misstating the "true" ownership interests of each stock purchase; and five counts of causing Stix to keep false records in violation of 15 U.S.C. §§ 78q(a)(i) and 78ff and 18 U.S.C. § 2 (Superceding Indictment, Counts 2-13, 23-24, 30-34, 35-39).

Co-defendant Miller pleaded guilty as the result of an agreement with the Government pursuant to which he testified at the trial as a prosecution witness. On April 28, 1983, petitioner and co-defendant Skinner were convicted on all counts. Petitioner was sentenced on May 27, 1983 to a term of twenty years imprisonment, $45,000.00 in fines, and five years of probation.

2. The Trial Evidence.

The Government called 30 witnesses in its case in chief against petitioner and co-defendant Skinner. Conspicuous by his absence, however, was Thomas Brimberry, the former margin clerk at Stix (2 Tr. 84) who "masterminded" the entire scheme (App. A, *infra*, 2a). Brimberry

had accepted a plea agreement in exchange for his cooperation with the Government in its prosecution of petitioner at an early stage of the investigation. The Government subsequently learned that Brimberry rather than petitioner had engineered the scheme and "decided . . . that Tom Brimberry would not be a Government witness in this case . . . ." Brimberry was then indicted for ten counts of perjury, three counts of obstruction of justice, and two counts of concealing the assets of Stix (12 Tr. 31, Gov't Stipulation). Nevertheless, many of Brimberry's statements were admitted into evidence over petitioner's objections through other Government witnesses.

The Government presented the following evidence at trial:

Brimberry's wife, Janice, testified that in 1974 Brimberry opened a margin account at Stix under her maiden name, "J. A. Miller" (2 Tr. 87), but did not admit to her until 1975 that he created this account by manipulating Stix's collateral records (2 Tr. 89). In 1976, Brimberry began to make false entries into ten margin accounts at Stix to show the receipt of non-existent fully paid securities into those ten accounts (2 Tr. 90-93). This allowed Brimberry to withdraw large amounts of money from the ten accounts (10 Tr. 7); Brimberry ultimately embezzled approximately $16,000,000 from Stix in this manner (10 Tr. 11). The ten accounts included five controlled by Brimberry in various straw names, two accounts in the name of petitioner, who was Brimberry's attorney, two accounts in the name of Jerry Maeras, an associate of Brimberry's, and one account in the name of Arthur Miller, Jr., Brimberry's brother-in-law (2 Tr. 90-96).

To make his scheme succeed, Brimberry had to put false securities in a vault to be counted by Stix auditors and the regulatory authorities (2 Tr. 90-93). To this end, Brim-

berry's wife purchased blank stock certificates and had printing firms print the names of real securities on them (2 Tr. 93, 98). The names of the president and secretary of the firms were then signed by Jerry Maeras on the blank certificate and placed in the vault by Brimberry (2 Tr. 96, 97). After the IRS began to investigate Brimberry in 1981, Janice Brimberry helped him shred the phony certificates (2 Tr. 100).

The Government's evidence showed that one of petitioner's accounts was the only one of the ten that contained "legitimate" money (10 Tr. 29). Petitioner had placed $60,000 of his own money in this account in 1975 (10 Tr. 29). Further, Janice Brimberry testified that Maeras and Miller knew of the phony stock certificates but that, to her knowledge, petitioner did not (3 Tr. 31, 46-47).

Brimberry had to insure that Stix met certain SEC minimum "net capital" regulations before he could withdraw substantial amounts of money from margin accounts. (10 Tr. 57-58). Subordinated loans are unsecured loans that the SEC includes in its definition of net capital (10 Tr. 57-58). In 1977, "A. E. Shaw" made a subordinated loan to Stix; A. E. Shaw is the maiden name of Maeras's wife (4 Tr. 143; 7 Tr. 56). Petitioner approved the documents for this loan, which had been forwarded to him by Stix. Petitioner knew that Maeras signed his wife's maiden name to the loan documents, but Maeras did so with her knowledge and permission (6 Tr. 163, 164).* Further,

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* The court of appeals mischaracterized the evidence at App. A, *infra*, 19a, by stating that petitioner told Maeras to "forge" the name A.E. Shaw. Maeras's uncontradicted testimony was that he had his wife's permission to sign her maiden name to the document (6 Tr. 163). Further, petitioner did not draw up the papers for this loan agreement as the court stated at App. A., *infra*, 4a; the evidence at trial showed that Stix prepared the documents and forwarded them to petitioner (4 Tr. 143-44).

the interest checks from this loan were sent to petitioner's office, where Maeras picked them up. According to Maeras, petitioner knew that Maeras split the interest proceeds with Brimberry (6 Tr. 57-62).

In 1978, petitioner arranged a subordinated loan to Stix from the Helen Kamadulski Trust (4 Tr. 162). Helen Kamadulski was the maiden name of Brimberry's mother-in-law (7 Tr. 80-82). The interest checks from this loan were sent to petitioner, who deposited them in his business account and credited them as attorney's fees from Brimberry (7 Tr. 68-69). Funds for both loans came from the margin accounts Brimberry manipulated (10 Tr. 133-34).

Brimberry and his brother-in-law, Arthur Miller, Jr., had an agreement to split on a fifty-fifty basis all the money withdrawn from the margin account Brimberry had opened for Miller (8 Tr. 23). To effect this split, Miller would deposit Stix's checks in a bank account he had and then withdraw half of the amount in cash from the account to give to Skinner for Brimberry (8 Tr. 27-36).

In the summer of 1979, Miller had an argument with Brimberry and threatened to turn him in to Stix and to the IRS (8 Tr. 59-63). According to Miller, Brimberry said that if he did, he would get a lot of people in trouble, including Brimberry, petitioner, Maeras, himself, and others (8 Tr. 61). Miller told Brimberry that he would think about it before making a decision. Later that day, Brimberry sent Skinner to Miller's house to make sure that Miller didn't do anything "silly" (8 Tr. 64). Miller told Skinner to tell Brimberry that he had decided not to turn them in (8 Tr. 64-66).

Brimberry and unindicted conspirators Maeras and Miller used some of the money they took from Stix to start businesses. One such corporation, Jerry Steven Maeras, Inc., was intended by Brimberry and Maeras to operate

a nursing home (2 Tr. 112). Another was Miller Excavating, at which Miller worked from 1976 to 1981 and served as one of the original officers (7 Tr. 34). Petitioner did the legal work in setting up these corporations (2 Tr. 117; 7 Tr. 34).

According to Janice Brimberry, Tom Brimberry told her that he and petitioner were trying to purchase a controlling interest in Stix and that, while the purchase would be made in petitioner's name, ownership would be split "fifty-fifty" between them (2 Tr. 153). The funds came from the ten margin accounts Brimberry was manipulating (2 Tr. 153). Frederic Arnstein, former president of Stix, testified that petitioner told Arnstein he was using his own funds to purchase the stock; Arnstein further testified that he would not have voted to sell stock to petitioner if he had known that Brimberry was providing the funds (4 Tr. 9-11).

Petitioner purchased approximately 60% of the outstanding shares of Stix, and became a member of the board of directors at Stix (4 Tr. 13). After these purchases, at a stockholders meeting in December 1979, Brimberry was elected to the board; Chief Financial Officer O'Connell and General Counsel Marx were voted off of the board (4 Tr. 19-20). O'Connell later was voted back on the board (4 Tr. 184). In September, 1980, Brimberry was promoted to senior vice-president at Stix and given control of operations (4 Tr. 23). According to Arnstein, petitioner told him in June 1981 that anyone who disagreed incorrectly with Brimberry about a problem and went over his head might be fired (4 Tr. 30).

James Hamer, a former stock clerk at Stix, testified that in 1979 or 1980 Brimberry told him that petitioner had "picked" Brimberry to run the "back office" operations at Stix (5 Tr. 164). In late October, 1981, a routine

private audit disclosed improper "segregation" of securities. Hamer testified that during this time he heard petitioner tell Brimberry to "fire" the auditors if they were giving him "heat" concerning the segregation problem (5 Tr. 171).

Hamer further testified that he had noticed as early as 1976 that Brimberry was not properly documenting securities for some of the accounts, but Brimberry told him not to worry about it (5 Tr. 165-66). Although he was suspicious of Brimberry beginning in 1976, Hamer admitted that petitioner never inhibited him in any way from following up on his suspicions (5 Tr. 178).

Between 1978 and 1981, Brimberry enjoyed an extravagant lifestyle, which included the construction of an expensive home in Granite City, Illinois (2 Tr. 127). Brimberry was concerned about having the amount of his wealth come to the attention of the IRS without being able to explain his source of income (2 Tr. 125, 128; 8 Tr. 13). In order to show a source of money for this house, Brimberry obtained a loan of $250,000 from petitioner (2 Tr. 128). According to Janice Brimberry, her husband said that if the IRS asked her about the source of the money used to purchase the house, she should say that they obtained a loan from petitioner and that a note could be produced if necessary (2 Tr. 128).

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* Here again the court of appeals mischaracterized the evidence. In describing the lavish lifestyle of the co-conspirators at App. A, *infra*, 6a, the court stated that petitioner took frequent trips to Las Vegas and other locations together with Brimberry and co-defendant Skinner. There was no evidence at trial that petitioner went to Las Vegas or the other locations with Brimberry and Skinner, though evidence did show that those two traveled together frequently.

Arnstein testified that after the federal investigation of Stix uncovered the fact that a substantial number of collateral securities were missing, petitioner told him that the missing securities belonged to Brimberry (4 Tr. 34). Arnstein further testified that petitioner ceased participating in the affairs of Stix after this discovery (4 Tr. 35).

Petitioner testified in his own defense. He stated that he had no knowledge of the accounts controlled by Brimberry, other than his own, until after the Government investigation in November 1981 (11 Tr. 62). As for his accounts, petitioner testified that in 1976, Brimberry opened a margin account for petitioner and his wife at Stix and placed $200,000.00 worth of stock in it. Brimberry told petitioner that he did this as a token of friendship (11 Tr. 68). Petitioner thought that Brimberry was very wealthy from inheritance and stock investments (11 Tr. 71-72). In this regard, he was no different than many of the Government's witnesses. Arnstein (4 Tr. 89-92), O'Connell (4 Tr. 190-91), Maeras (6 Tr. 124), Viva Elliot, Brimberry's former secretary (7 Tr. 116), and even Brimberry's wife Janice (2 Tr. 89) all believed that Brimberry had inherited wealth.

Petitioner testified that he was not directly involved in the day-to-day operations or bookkeeping of the Miller Excavating Company or Jerry Maeras Enterprises. He was involved only in their creation and legal representation (11 Tr. 59, 61).

Petitioner testified that the Kamadulski Trust subordinated loan account was established at Brimberry's request. Brimberry wanted to benefit his mother-in-law, Helen Miller, whose maiden name was Helen Kamadulski (11 Tr. 75). Petitioner had no fraudulent intent in using the name "Kamadulski"; it was for the purpose of keeping the trust confidential (11 Tr. 76). In addition, petitioner received the interest on this loan as payment for past

legal work pursuant to the instructions of Brimberry, who as settlor had control of the interest of the trust (11 Tr. 88). Petitioner reported all of the income he received from the Kamadulski Trust to the IRS (12 Tr. 20-21).

With regard to the A. E. Shaw subordinated loan, petitioner thought that the money was coming from Alma Maeras, whom individuals at Stix knew had the maiden name "Shaw" (11 Tr. 90-92). The loan agreement was drawn up by Stix and approved by petitioner (11 Tr. 91). He thought the interest payments were being received by Alma and Jerry Maeras (11 Tr. 93).

Petitioner purchased stock in Stix at the suggestion of Brimberry, who provided the money for the purchase. Petitioner retained full ownership and control of the stock (11 Tr. 113). In September of 1981, Brimberry opposed a proposal to the Stix board of directors to increase the inventory for the bond department. This increase would have meant less money for the margin accounts. Petitioner, on the other hand, supported the proposal and it passed (11 Tr. 124-25).

Petitioner testified that he loaned Brimberry $250,000 in order to allow Brimberry to defer taxes from 1980 to 1981 (11 Tr. 127-28).

Petitioner further testified that he was not involved at all with the "back office" operations at Stix; that he was never in the vault at Stix; and that he knew nothing about any irregularities with stock certificates at Stix (11 Tr. 149-150). Petitioner's Exhibits D and E, Stix's vault authorization list and vault entrance records, showed that petitioner was not authorized to have access to the vault and was never listed as having entered the vault (12 Tr. 27-30). The SEC's Chicago branch chief admitted that if the certificates had been legitimate, there would have been no fraud on Stix (10 Tr. 94-98).

Petitioner was not the only person at Stix deceived by Brimberry's machinations. Stix president Arnstein, who was far more knowledgeable than petitioner about the operations of a brokerage house, admitted that he never had cause to believe that "stealing" of such magnitude was going on (4 Tr. 94). Arnstein also acknowledged that petitioner never demonstrated any in-depth experience in stock brokerage operations (4 Tr. 65). Stix's own accountants apparently were deceived by Brimberry during their annual audits from 1975 to 1981 (4 Tr. 52). The Chief Examiner for the Broker Dealer Branch of the SEC's Chicago Regional Office acknowledged that even the auditors from the National Association of Securities Dealers were "fooled" by Brimberry (2 Tr. 49).

3. The District Court Proceedings.

Petitioner's defense was that he was unaware of any scheme to loot Stix and was not a knowing participant in any conspiracy. Despite the Government's use of co-conspirators and of former Stix officers as witnesses, no Government witness was able to provide any direct proof that petitioner knew of the fraudulent scheme. Indeed, at least one key Government witness, Janice Brimberry, admitted that to her knowledge petitioner did not know about the false securities (3 Tr. 31, 46-47).

Over petitioner's objection the jury was instructed that "a defendant's knowledge of a fact may be inferred from willful blindness to the existence of a fact" (Jury Instruction #65). The jury returned verdicts of guilty as to all counts against petitioner, and the trial judge entered judgment on those verdicts.

4. The Court Of Appeals Proceedings.

The court of appeals affirmed petitioner's conviction on all counts (App. A, *infra*, 1a). A timely petition for rehearing was denied without opinion (App. B, *infra*, 35a).

REASONS FOR GRANTING THE WRIT

I. The Application Of The Harmless Error Doctrine To Petitioner's Sixth Amendment Confrontation Clause Claim Directly Conflicts With This Court's Decisions In Kotteakos v. United States, 328 U.S. 750 (1946), Chapman v. California, 386 U.S. 18 (1967), and Harrington v. California, 395 U.S. 290 (1969).

Thomas Brimberry was the mastermind of the Stix swindle. As an unindicted co-conspirator who had agreed to testify on behalf of the Government at petitioner's trial, he was a logical prosecution witness at trial. In fact, the Government's inability to produce *any* witness who could offer direct testimony of petitioner's knowledge of, or participation in, the conspiracy made Brimberry a crucial witness. The Government did not call Brimberry to the witness stand, however, because it discovered that he lied in testimony to the grand jury designed to minimize his own importance in the conspiracy. Nevertheless, the district court permitted the Government to introduce numerous Brimberry statements over petitioner's objections through its other witnesses pursuant to Federal Rule of Evidence 801(d)(2)(E), which provides that "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy" is not hearsay.

After affirming the district court's interpretation of Rule 801(d)(2)(E), the court of appeals addressed petitioner's objection that this second-hand testimony violated his Sixth Amendment right to confrontation. The court's ruling that the Confrontation Clause almost certainly did not permit admission of these Brimberry statements is

unassailable. The court of appeals correctly held applicable to this case the Sixth Amendment standard enunciated by this Court in *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980):

> when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability."

(App. A, *infra*, 14a-15a). Recognizing that "the co-conspirator rule is not 'a firmly rooted hearsay exception' from which 'reliability can be inferred without more,'" the court of appeals analyzed the reliability of Brimberry's out-of-court statements (App. A, *infra*, 16a-17a). The court concluded: "Brimberry's penchant for lying no matter what was at stake may be the type of unusual circumstance which would require the exclusion of his out-of-court statements under the confrontation clause despite their admissibility under Rule 801(d)(2)(E)" (App. A, *infra*, 17a-18a). The court of appeals further acknowldeged "serious questions about Brimberry's availability" and concluded that "the government may have been obligated to make Brimberry available for cross-examination in order to use his out-of-court statements in conformity with the confrontation clause" (App. A, *infra*, 18a).

Nevertheless, the court of appeals held that "any error was harmless beyond a reasonable doubt" because "[o]ther reliable, nonhearsay evidence linked Massa to these three men and the fraud at Stix" (App. A, *infra*, 18a-19a). Unfortunately, the court embarked upon its harmless error analysis without the guidance of the parties; the Government argued only that Brimberry's out-of-court statements did not violate the Confrontation Clause and never advanced an alternative argument that any Sixth Amendment error was harmless. Consequently, the court of

appeals reached its conclusion through an unconstitutionally lax harmless error analysis that focussed only on the question whether the record contained other incriminating evidence.

"In reviewing a federal criminal conviction, a federal appellate court should apply a stringent harmless error test—more stringent than the test that is constitutionally permissible in state court proceedings under *Chapman* v. *California,* 386 U.S. (1967)." *United States* v. *Hasting,* 461 U.S. 499, 103 S. Ct. 1974, 1984 (1983) (Stevens, J., concurring). The excerpt of this Court's opinion in *Kotteakos* v. *United States,* 328 U.S. 750, 763-64 (1946), quoted by Justice Stevens in his *Hasting* opinion, explains how the court of appeals should have approached the harmless error determination below:

> it is not the appellate court's function to determine guilt or innocence . . . . Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out . . . . the question is, not were [the jury] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.

The court of appeals made no effort to evaluate the impact of the erroneously admitted evidence on the jury. Rather, it satisfied itself that the record contained other evidence linking petitioner to Brimberry and his confessed co-conspirators, and then it affirmed the conviction.

Even the slightly less stringent test of *Chapman* v. *California* requires a court of appeals to focus on the impact that improperly admitted evidence might have had on the jury: "An error in admitting plainly relevant evidence

which possibly influenced the jury adversely to a litigant cannot, under *Fahy* [v. *Connecticut*, 375 U.S. 85 (1963)], be conceived of as harmless." 386 U.S. at 23-24. Consequently, the *Chapman* Court explicitly rejected an "overwhelming evidence" standard for determining harmless error that would require only an analysis of the strength of the unchallenged evidence in the record, 386 U.S. at 23.

In *Harrington* v. *California*, 395 U.S. 250 (1969), this Court first applied the *Chapman* harmless error standard to a Confrontation Clause claim. The Court there reiterated its rejection of the simple "overwhelming evidence" standard and again noted its obligation to determine "the probable impact of the two confessions on the minds of an average jury." 395 U.S. at 254.

In evaluating the impact improperly admitted evidence has on the mind of the jury, this Court always has compared the quality of the remaining evidence in the record with the effects of the constitutional violation. In *Chapman* this Court held that even "a reasonably strong 'circumstantial web of evidence' against petitioners" could not support the conviction where "honest, fair-minded jurors might very well have brought in not-guilty verdicts" absent the constitutional violation. 386 U.S. 25-26. In *Harrington*, this Court stressed that "the case against Harrington was not woven from circumstantial evidence." 395 U.S. at 254.

Indeed, this Court has never affirmed a harmless error ruling in a Confrontation Clause claim where all of the unchallenged evidence was circumstantial; each such affirmance was based upon a record containing strong direct proof of guilt. *See Harrington* v. *California*, *supra*, (witnesses testified that Harrington "had a gun and was an active participant" in the murder and attempted robbery); *Schneble* v. *Florida*, 405 U.S. 427 (1972) (petitioner gave

a "minutely detailed" confession of the strangulation/shooting murder of a woman that was "completely consistent with the objective evidence," 405 U.S. at 430); *Brown* v. *United States*, 411 U.S. 223 (1973) (petitioners were observed and photographed during the commission of the crime by police officers on surveillance). *See also Dutton* v. *Evans*, 400 U.S. 74, 90 (1970) (Blackmun, J., concurring) (eyewitness described details of the brutal murder of three police officers); *Parker* v. *Randolph*, 442 U.S. 62, 77 (1979) (Blackmun, J., concurring) (each respondent had confessed to his participation in the murder and robbery).

The evidence against petitioner was of a qualitatively different nature. The Government conceded in its brief to the Eighth Circuit that its evidence was strictly "circumstantial" (Appellee's Br. at 18). None of the co-conspirators who testified—Maeras, Miller, and Janice Brimberry—could state of their own knowledge that petitioner was a knowing participant in their scheme to loot Stix. Others involved with Brimberry and Stix, including Stix officers, Stix auditors, and government officials, admitted to being fooled, some for five or six years, by the web of deceit woven by Brimberry.

The testimony concerning Brimberry's out-of-court statements includes the most damning evidence in the trial concerning the conspiracy and petitioner's alleged participation therein. Examples include Janice Brimberry's testimony that:

> (1) Brimberry told her that petitioner and he were going to try to buy a controlling interest in Stix and that while the purchase would be in petitioner's name, they would split the stock fifty-fifty (2 Tr. 153);
>
> (2) Brimberry told her that petitioner was going to loan him $250,000 so that Brimberry could hide the

cost of the construction of his new home from the IRS (2 Tr. 103, 128);

(3) Brimberry told her that the stock in petitioner's account at Stix was not legitimate (2 Tr. 111);

(4) Brimberry told her that he made "adjustments" to accounts at Stix and covered these up with phony stock certificates (2 Tr. 89).

Unindicted co-conspirator Miller testified that:

(1) When trying to talk him out of informing the IRS of the Stix swindle, Brimberry told him that petitioner was one of the people he would get in trouble (8 Tr. 61);

(2) Brimberry told him that he (Brimberry) and petitioner were getting a controlling interest in Stix by buying stock in petitioner's name (8 Tr. 55);

(3) Brimberry said that he and petitioner would have to remove a member of the board of directors at Stix who wasn't going along with them (8 Tr. 57);

(4) Brimberry told him that large checks he was taking to Las Vegas were being "laundered" so that the IRS could not trace the money which was illegally obtained from Stix (8 Tr. 52).

Unindicted co-conspirator Maeras testified that:

(1) Brimberry told him that he (Brimberry) and Massa were taking money from the A.E. Shaw account and buying Stix stock, which they split "50-50," to gain control of Stix (6 Tr. 84-85);

(2) Brimberry told him that he (Brimberry) was going to invest money in subordinated notes to Stix to make A.E. Shaw look like a well-to-do person (6 Tr. 34);

(3) Brimberry told him that the money for the A.E. Shaw subordinated loan came from Stix & Co. through the Maeras Enterprises Margin Account (6 Tr. 41);

(4) Brimberry told him that it was a mistake to send in the social security number for A.E. Shaw to Stix because now tax would have to be paid on that account (6 Tr. 76).

James Hamer, a former stock clerk at Stix, testified that:

(1) Brimberry told him that petitioner had "picked" Brimberry to run the back office operations at Stix (5 Tr. 164);

(2) Brimberry told him that petitioner had instructed Brimberry not to use certain unspecified securities for loan purposes but to keep them under his control (5 Tr. 167).

The district court had an opinion of the strength of the Government's evidence that differed from that of the court of appeals. In denying petitioner's motion for directed verdict, the district court stated that "the Government's case passes muster, albeit not mightily" (11 Tr. 28).* That observation, of course, encompassed all of the objectionable evidence of Brimberry's statements. The district court's observation is of great significance because its view of the evidence most closely parallels that of the jury. Given the emphasis placed on the jury's perspective in assessing harmless error, *Kotteakos* v. *United States*, 328 U.S. at 763-64, the court of appeals should not have disregarded this observation and blithely concluded that the improperly admitted evidence was "hardly damaging enough to require reversal" (App. A, *infra*, 19a).

Petitioner's right to confront the witnesses against him is clearly a substantial right, and the district court's decision to permit witnesses to testify to Brimberry's out-of-

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* The Government submitted no evidence in rebuttal.

court statements affected that right. *See* 28 U.S.C. § 2111. The appellate court's harmless error conclusion was based upon an improper standard that ignored the impact of Brimberry's out-of-court statement on a jury that had been presented with exclusively circumstantial evidence. That conclusion cannot stand in light of *Kotteakos* v. *United States*, 328 U.S. 750 (1946), or *Chapman* v. *California*, 386 U.S. 18 (1967), and *Harrington* v. *California*, 395 U.S. 250 (1969).

II. The Decision Below Conflicts Directly With Decisions Of The Second Circuit Concerning The Proper Form For A Jury Instruction Explaining "Willful Blindness".

Petitioner's defense at trial was that he was unaware of any scheme to loot Stix and was not a knowing participant in any conspiracy. The Government was unable to produce any direct evidence to the contrary. Consequently, the issue whether petitioner's actions were motivated by criminal intent was of paramount importance in the jury's deliberations.

Government's Instruction #65, which the district court read to the jury over petitioner's objection, addressed the question whether petitioner had knowledge of Brimberry's scheme to defraud Stix:

> The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him. A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from willful blindness to the existence of a fact.
>
> It is entirely up to you as to whether you find any deliberate closing of the eyes, and the inferences to

> be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge.

On appeal, petitioner argued that this instruction permitted the jury to convict based upon an objective, or 'should have known,' standard of knowledge rather than upon an actual knowledge standard as required by law. The court of appeals rejected this argument and affirmed use of this instruction, noting that "[s]everal circuits . . . have approved similar instructions which allow the jury to infer the element of knowledge from deliberate indifference" (App. A, *infra*, 24a).

The Second Circuit, however, has expressly *disapproved* similar instructions and has reversed convictions in cases in which the trial court failed to give a more balanced "willful blindness" instruction in the face of a defendant's denial of guilty knowledge. In *United States* v. *Bright*, 517 F.2d 584 (2d Cir. 1975), the Second Circuit reversed a conviction for possession of stolen mail where "[t]he issue of knowledge was the only issue in dispute at appellant's trial," 517 F.2d at 586, and the district court gave a "willful blindness" instruction that did not include a direction to acquit if the jury found that the defendant actually believed that the checks were not stolen. 517 F.2d at 588. The court ruled that "at the crucial stage with the single element at issue, the defendant's 'knowledge' that the checks were stolen, the instruction given was insufficient to give the jury the proper balance required." *Id.* Although the district court in *Bright* had given a separate reasonable doubt instruction, as did the district court below, the Second Circuit held "that the lack of juxtaposition of the choices available in a balanced way was fatally erroneous. . . ." *Id.*

The *Bright* court adopted section 2.02(7) of the American Law Institute's draft Model Penal Code (Proposed Official Draft 1962), which states:

> When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

In selecting section 2.02(7) as its model, the Second Circuit noted that this Court had twice approved the definition of "knowledge" in this section. *Leary* v. *United States*, 395 U.S. 6, 46 n.93 (1969); *Turner* v. *United States*, 396 U.S. 398, 416 n.29 (1970). 517 F.2d at 587.

Government Instruction #65 differs from section 2.02(7) in two important respects. First, it does not require the jury to find that petitioner was aware of a "high probability" that Stix was being defrauded before invoking the willful blindness doctrine. Second, Government Instruction #65 does not make clear that a defendant acting in good faith without knowledge of the scheme to defraud cannot be convicted. *E.g., United States* v. *Price*, 623 F.2d 587, 592 (9th Cir.), *cert. denied*, 449 U.S. 1016 (1980). Clarity in the jury charge on this point is crucial in this case, where the defense did not deny that certain acts petitioner performed at his client Brimberry's request unwittingly furthered Brimberry's fraudulent scheme. *See Milam* v. *United States*, 322 F.2d 104 (5th Cir. 1963) *cert. denied*, 377 U.S. 911 (1964). Clarity in the jury charge also was essential because the prosecutor, in the rebuttal portion of his closing argument, told the jury that the Government didn't have to prove that petitioner knew the securities were false (13 Tr. 113).

Since *Bright*, the Second Circuit has remained firm in requiring a balanced instruction on the issue of willful blindness. In *United States* v. *Aulet*, 618 F.2d 182, 190 (2d

Cir. 1980), the Second Circuit "noted that a defendant is entitled to instructions on the question of conscious avoidance that balance the 'high probaility' test of knowledge of a given fact with its negation by actual belief in the nonexistence of that fact." The *Aulet* court was able to affirm the conviction before it because the district court's charge conformed to section 2.02(7). The Second Circuit recently has reiterated the rule of *Bright*. *United States* v. *Shareef*, 714 F.2d 232 (2d Cir. 1983). The *Shareef* court specifcally held that an instruction that omitted a directive to acquit upon a finding of actual belief was insufficient even though it stated that a defendant's negligence or foolishness did not establish knowledge. 714 F.2d at 234.

Government Instruction #65 permitted the jury to convict petitioner if the jury believed that petitioner should have known of Brimberry's scheme even if it decided that he actually did not know of the scheme. Consequently that instruction was both erroneous and fundamentally unfair to petitioner, whose entire defense hinged upon his actual lack of knowledge of Brimberry's scheme. The Second Circuit has adopted an instruction that correctly states the law and would have avoided this fundamental unfairness to petitioner. In view of the importance of maintaining uniform administration of justice and legal accuracy in jury instructions where liberty is at stake, this Court should issue the writ of certiorari and bring the courts of appeals into conformity with the "willful blindness" law of the Second Circuit.

III. Counts Thirty Through Thirty-Four Fail To Charge Petitioner With Violations Of The Securities Laws Under The "Economic Realities" Test Of United Housing Foundation, Inc. v. Forman, 421 U.S. 837 (1975), And Must Be Dismissed.

In Counts Thirty through Thirty-Four, the Government charged petitioner with making untrue statements in connection with his purchases of Stix stock, in violation of 15 U.S.C. § 78j(b). Petitioner was convicted on each of these counts and the district court sentenced him to a four-year term of imprisonment and a $3,000.00 fine on each count. The prison terms imposed on Counts Thirty through Thirty-Four are to run concurrent with each other but consecutive to the sentences imposed on the other counts (Sentencing Tr. 14). The acts alleged in these counts to violate the federal securities laws, however, fall outside the scope of those laws. Consequently, these counts fail to charge offenses and petitioner's convictions on them must be reversed.

Section 78j(b) proscribes the use of manipulative or deceptive contrivances "in connection with the purchase or sale of any security . . . ." The fact that the allegedly violative transactions took the form of stock purchases, though, does not mean that they fall within the purview of section 78j(b). In *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 848 (1975), this Court rejected the argument that a "transaction, evidenced by the sale of shares called 'stock,' must be considered a security transaction simply because the statutory definition of a security includes the words 'any . . . stock.' " Rather, this Court stated that "Congress intended the application of these statutes to turn on the economic realities underlying a transaction, and not on the name appended thereto." 421 U.S. at 849. In *Forman*, this Court held that the "basic

test'' for distinguishing a security is ''whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others.'' 421 U.S. at 852, *quoting SEC* v. *W.J. Howey Co.*, 328 U.S. 293, 301 (1946).

In applying this ''basic test,'' at least four courts of appeals have developed the 'sale-of-business' doctrine, ''under which a purchaser of stock who assumes control of a company is not an 'investor' expecting profits from the efforts of others under the *Howey* test, and the stock purchased therefore is not a 'security' within the meaning of the Act.'' *Landreth Timber Co.* v. *Landreth*, 731 F.2d 1348, 1351 (9th Cir.), *cert. granted*, 53 U.S.L.W. 3365 (U.S. Nov. 13, 1984) (No. 83-1961). *Accord, Christy* v. *Cambron*, 710 F.2d 669, 672 (10th Cir. 1983); *King* v. *Winkler*, 673 F.2d 342, 345 (11th Cir. 1982); and *Canfield* v. *Rapp & Son, Inc.*, 654 F.2d 459, 465 (7th Cir. 1981). Other courts of appeals have rejected the sale-of-business doctrine in favor of a definition of securities focusing on ''the traditional incidents of stock ownership,'' thus creating a split among the circuits. *Ruefenacht* v. *O'Halloran*, 737 F.2d 320, 338-39 (3rd Cir.), *cert. granted sub nom. Gould* v. *Ruefenacht*, 53 U.S.L.W. 3365 (U.S. Nov. 13, 1984) (No. 84-165). *Accord, Seagrave Corp.* v. *Vista Resources, Inc.*, 710 F.2d 95 (2d Cir. 1983), *cert. granted*, 104 S. Ct. 2341, *cert. dismissed*, 105 S. Ct. 23 (1984); *Daily* v. *Morgan*, 701 F.2d 496 (5th Cir. 1983); *Coffin* v. *Polishing Machines, Inc.*, 596 F.2d 1202, 1204 (4th Cir.), *cert. denied*, 444 U.S. 868 (1979). This Court recently granted certiorari in *Landreth Timber* and *Ruefenacht* to resolve this split.

This case presents for the first time the issue whether the sale-of-business doctrine applies in a criminal prosecution. The indictment itself alleges that petitioner pur-

chased control of the business rather than securities for investment purposes. Paragraph 8.F.28 states: "These purchases gave Massa approximately 60% of the total outstanding Stix stock." Paragraph 8.F.30 states: "Defendant James Massa, at all relevant times herein, held the Stix stock in his own name and exercised decision making authority at Stix." Paragraphs 8.F.31, 32, and 33 also assert that petitioner had a "controlling interest in Stix" and "effective control over the operations of Stix." Clearly petitioner's acquisition of control over Stix was not alleged to 'involve[] an investment of money in a common enterprise with profits to come solely from the efforts of others." *Forman*, 421 U.S. at 852. The indictment alleged that petitioner purchased a company rather than some securities, and Counts 30 through 34 consequently failed to charge a violation of the federal securities laws.

The fact that petitioner did not purchase 100% of the outstanding stock of Stix is irrelevant to the application of the sale-of-business doctrine under the *Forman* test. Several courts have applied the doctrine to transactions involving less than 100% of the relevant companies' stock. *E.g.*, *Christison* v. *Groen*, 740 F.2d 593 (7th Cir. 1984); *Christy* v. *Cambron*, 710 F.2d 669, 672 & n.1 (10th Cir. 1983); *Oakhill Cemetery of Hammond, Inc.* v. *Tri-State Bank*, 513 F. Supp. 885, 890 (N.D. Ill. 1981). *Accord*, *Kaiser* v. *Olson*, 105 Ill. App. 3d 1008, 1012-14, 435 N.E.2d 113, 117-18 (1st Dist. 1981). *See King* v. *Winkler*, 673 F.2d 342, 346 (11th Cir. 1982). The "economic realities" of petitioner's purchase govern, and the indictment reflects a total absence of investment purpose that takes the purchase outside the ambit of the federal securities laws. *Forman*, 421 U.S. at 849; *Landreth Timber Co.*, 731 F.2d at 1351.

Although petitioner did not object to the failure of Counts Thirty through Thirty-Four to charge an offense in the courts below, he has not waived this objection. Under Federal Rule of Criminal Procedure 12(b)(2) an objection that the indictment fails to charge an offense "shall be noticed by the court at any time during the pendency of the proceedings." *See United States* v. *Meacham*, 626 F.2d 503, 509 (5th Cir. 1980).

Furthermore, petitioner's conviction on Counts Thirty to Thirty-Four constitutes "plain error." Under Federal Rule of Criminal Procedure 52(b), "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." There can be no question that "the right to be free of prosecution under an indictment that fails to charge an offense is a substantial right." *United States* v. *Meacham*, 626 F.2d at 509. *Accord, United States* v. *Roach*, 321 F.2d 1, 4 & n.8 (3d Cir. 1963). Additionally, petitioner's liberty and property rights have been affected: his sentence on Counts Thirty through Thirty-Four adds four years of imprisonment and $15,000 to the sentence imposed on the other counts. Under these circumstances, this Court should address this issue.

Counts Thirty through Thirty-Four fail to charge a violation of the federal securities laws under the "basic test" set forth in *Howey* and *Forman*. Petitioner has been prejudiced by being prosecuted, convicted, and sentenced on those counts. This Court should issue the Writ of Certiorari to correct this injustice. Because this Court has pending before it two civil cases posing questions concerning the sale-of-business doctrine, petitioner respectfully suggests that this Court take this case as a companion case so that it can assess the impact of this doctrine in the criminal as well as civil context.

CONCLUSION

For the reasons set forth above, Petitioner James Massa respectfully requests that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this cause.

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Dated: December 18, 1984

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1756

United States of America, *
Appellee, *
v. *
*
James Massa, *
Appellant. *

Appeals from the United States District Court for the Eastern District of Missouri.

No. 83-1803

United States of America, *
Appellee, *
v. *
*
Duane Skinner, *
Appellant. *

Submitted: March 12, 1984
Filed: August 6, 1984

Before HEANEY, Circuit Judge, and FLOYD R. GIBSON and HENLEY, Senior Circuit Judges.

HEANEY, Circuit Judge.

James Massa and Duane Skinner appeal their criminal convictions on a forty-three count indictment arising out of the massive swindle of the Stix & Company brokerage firm (Stix). The indictment charged Massa and Skinner with participation in a scheme masterminded by unindicted coconspirator Thomas Brimberry to loot the Stix firm. Brimberry, a one-time margin clerk for Stix, devised a plan for creating false internal records at Stix which allowed funds to be withdrawn from various accounts on the basis of nonexistent collateral. Count one of the indictment charged Massa, Skinner and others with conspiracy. Counts Two through Forty-three charged substantive violations including mail fraud, wire fraud, employment of manipulative and deceptive devices and contrivances in the purchase of Stix stock, causing Stix to keep false records, interstate transportation of false securities, and causing information to be kept from the Internal Revenue Service (IRS). After a fourteen-day trial, the jury convicted both defendants of all counts against them.

On appeal, both defendants challenge the sufficiency of the evidence and the admission of coconspirator hearsay statements. Both defendants also contend that a prejudicial variance existed between the single conspiracy alleged in the indictment and the multiple conspiracies they say were proved at trial. In addition, Skinner argues that the district court should have granted him a severance and that he was deprived of his right to a speedy trial under 18 U.S.C. § 3161(c) (1982). For the reasons detailed below, we affirm Massa's conviction on all counts. We also affirm Skinner's conviction on all but three counts of transporting forged securities in interstate commerce in violation of 18 U.S.C. § 2314 (1982).

I. BACKGROUND

The scheme to loot Stix and spend the money without being detected by the IRS and other governmental agencies was complex, involving some acts in and of themselves not illegal except that they were financed with misappropriated funds. At the center of the scheme was Brimberry and his manipulation of the margin accounts at Stix. As a margin clerk at Stix, Brimberry was responsible for properly maintaining the margin accounts and making sure that they were backed by adequate collateral. In about 1976, he began to make false entries into ten margin accounts, showing the receipt of nonexistent fully paid securities into the accounts. The ten accounts included five controlled by Brimberry, in various straw names; two accounts in the name of Jerry Maeras, an associate of Brimberry's; two accounts in Massa's name; and one account in the name of Arthur Miller, Jr., Brimberry's brother-in-law. The false entries allowed the purported owners of the accounts to withdraw huge sums of money from Stix. Over the life of the scheme, over $16 million was embezzled from Stix in this manner. Massa received approximately $2.5 million of this sum.

The participants in the scheme used various means to avoid detection and maximize their chances for continued success. An ongoing threat was that Stix auditors or government regulatory authorities would count the securities in the vault and realize that the numbers in the company's accounting records were inflated. To avoid this problem, Janice Brimberry, Thomas Brimberry's wife, and others purchased blank stock certificates from a firm in Chicago and had the names of real securities printed on them. Maeras forged the names of the presidents and secretaries of these firms on the certificates and Thomas Brimberry placed these fraudulent certificates in the vault at Stix.

Money could not be withdrawn from the margin accounts unless Stix showed the required "net capital" invested in the firm. Using embezzled money, Massa helped Brimberry set up subordinated loans to Stix which were counted as net capital by the regulatory authorities and allowed the conspirators to withdraw more money from the company. The first of these loans was ostensibly obtained from a person named A. E. Shaw. Shaw was the maiden name of the wife of Maeras. She never used that name except in connection with this loan transaction. Massa drew up the loan agreement for $150,000 and told Maeras to sign the agreement with the name A. E. Shaw. Massa then had his secretary notarize the agreement. Massa acted as the intermediary between "A. E. Shaw" and Stix. He transferred the money to Stix and had Stix send the interest checks to him. He would then pass the checks on to Maeras with Brimberry's permission, or to Skinner, Brimberry's runner. Brimberry told Stix that Shaw was a wealthy widow who was related to the president of Southern Illinois University and owned an island in the Caribbean. Massa confirmed this story to a Stix officer, saying Shaw was a "well-to-do lady." In fact, Maeras' wife had no money, as Massa knew, and the money came through Brimberry from Stix.

In approximately 1978, Massa arranged another subordinated loan from what purported to be the "Helen Kamadulski Trust." Helen Kamadulski is the maiden name of Brimberry's mother-in-law. She never used that name and neither knew of, nor received any income from, the trust. According to documents prepared and forwarded to Stix by Massa, he was the trustee and the settlor was a "January Management Company." The trust agreement showed Massa's personal legal secretary as the secretary of the settlor corporation.

She at first refused to sign the trust agreement because she knew the January Management Company did not exist. Massa eventually convinced her to sign. In total, the Helen Kamadulski trust loaned Stix $300,000, all of it embezzled from the ten margin accounts at Stix. Massa deposited the interest from the loan, approximately $101,000, in his personal checking account and converted it to his own use.

In order for the scheme to grow to the dimensions that it eventually did, it was necessary for members of the scheme to gain control of the Stix firm. During 1979, Massa purchased controlling interest in Stix using approximately $1 million Brimberry embezzled from the ten padded margin accounts. The money came out of Stix through a series of complicated financial transactions and was sent to Massa in cashier's checks in the names of A. E. Shaw and J. A. Miller. Massa then wrote checks payable to Stix for the stock. Massa claimed at trial that he thought the money came from Brimberry personally; but at the time he purchased the stock, Massa represented to the members and officers of Stix that he was using his own money.

After buying controlling interest in the firm, Massa removed the chief financial officer and another person from the board of directors and added Brimberry. He further promoted Brimberry to senior vice president in complete charge of the operations section of the firm—the section that oversaw the major accounts and the flow of cash from the firm. Massa instructed everyone at Stix, including its president, that Brimberry's directives were to be followed. He told the president of the firm that anyone who disagreed with Brimberry and tried to go over his head took the chance of being fired. After Massa took control of the firm, the amount of money he was withdrawing from his margin accounts increased substantially. In 1981, when independent auditors questioned evidence of serious cash

shortages at Stix, Massa told Brimberry to "fire the auditors." He also caused the board to adopt a resolution granting him consulting fees which totaled over $75,000.

From about 1978 to 1981, participants in the scheme began to exhibit a more lavish lifestyle. Brimberry, Massa, Skinner and others took frequent trips to Las Vegas together, sometimes as often as twice a month. They also traveled on more than one occasion to Hawaii, Disney World, the Bahamas, and Monte Carlo. Brimberry was building a very expensive home in Granite City, Illinois. He became concerned that the IRS might notice his relatively sudden show of wealth and inquire about his source of income. He therefore set up a loan for himself from Massa for $250,000. This money too came from the funds embezzled from Stix. Massa wrote Brimberry a check for the amount.

Another facet of the overall scheme to loot Stix and spend the money undetected was the creation of corporations fronted by Skinner for Brimberry. The largest of these was Miller Excavating, Inc. Massa incorporated this company and was an officer, director and shareholder. Arthur Miller, Jr., and Maeras were also officers and Skinner acted as president from 1978 until approximately 1981. More than $1.3 million of Stix money went to fund the operations and purchase of heavy equipment for the company. In 1980 and 1981, the name of the corporation was changed first to Bernate, Inc., and then to MZA, Inc. Brimberry continued to fund the corporation with Stix money and Skinner continued to act as president. Skinner also fronted two other corporations for Brimberry: Century III and Astro Travel. These corporations were also funded with approximately $395,000 in money embezzled from Stix. Massa was the attorney for, and officer and stockholder in, all of these corporations.

In addition to fronting corporations for Brimberry, Skinner did the odd jobs necessary to facilitate the scheme. On at least one occasion, he received the blank stock certificates that were to be forged and placed in the Stix vault and delivered them to Janice Brimberry. The monthly account statements and audit confirmation cards for five of the ten fraudulent accounts at Stix were sent to Miller Excavating where the secretaries turned them over to Skinner. When one of the participants in the scheme, Miller, began to get cold feet, Brimberry sent Skinner to make sure he did not do anything "silly."

Skinner's role in the scheme also included transferring money from other participants to Brimberry. For example, Miller and Brimberry split the money withdrawn from the fraudulent Miller account at Stix on a fifty-fifty basis. In order to effect this split, Skinner and Miller would take Stix's checks payable to Miller to a bank where Miller had an account. Miller would deposit the check to the account and give Skinner Brimberry's half in cash. On other occasions, Skinner would deposit Stix checks directly into Miller's account and later take Miller's checks, made out to cash, cash them at the bank and give Miller and Brimberry their halves in cash.

When Brimberry was building his mansion in Granite City, Skinner helped to hide the source of the funds. Brimberry would give Miller a money order in an amount greater than $50,000 drawn on an account maintained with funds embezzled from Stix. Miller would go to Las Vegas and deposit this money order against his line of credit at a casino. He would then withdraw the money in cash, bring it to St. Louis, and give it to Brimberry or Skinner. On the instructions of Janice or Tom Brimberry, Skinner would go to different banks on the same day and purchase cashier's checks for less than $10,000 payable to a con-

tractor. This method avoided detection by the IRS which would have been notified by the bank of any cash transactions exceeding $10,000.

Skinner, a certified public accountant, also prepared tax returns for Brimberry and others. The most income Brimberry reported was $87,000 in 1980. This figure took into account only the amount shown on Brimberry's W-2 form, despite the fact that Brimberry was expending millions of dollars through Skinner during that time. Skinner also prepared a tax return for Maeras showing the interest income from the fraudulent A. E. Shaw loan.

In October of 1981, the IRS and a federal grand jury began an investigation into the source of Brimberry's wealth. On November 2, 1981, Brimberry made a deal with the government, which has since been voided.[1] Two days later, when the existence and magnitude of the Stix fraud was disclosed to the public, Brimberry and Skinner left St. Louis and traveled to Phoenix, Arizona, where they resided with their families in Brimberry's $500,000 home until Skinner was arrested approximately a year later. Massa completely severed his relations with Stix when the fraud surfaced.

On December 14, 1982, a forty-three count indictment issued against Massa, Skinner and Miller. In addition to the conspiracy count, Counts Two through Thirteen charged Massa with nine separate incidents of mail fraud in relation to the mailing of false audit confirmations, false subordinated loan agreements and a Stix delivery receipt. Counts Twenty-three through Twenty-eight charged Massa with wire fraud based on wire transfers of money on six different dates. In Counts Thirty through Thirty-four,

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[1] Apparently, Brimberry lied to the grand jury because he has since been charged with obstruction of justice and making false statements.

Massa was charged with employment of manipulative and deceptive devices and contrivances in the purchase, on five separate occasions, of Stix stock. In Counts Thirty-five through Thirty-Nine, Massa was charged with five separate counts of causing Stix to keep false records in connection with the fraudulent loan agreements.

Skinner was also charged with conspiracy in Count One. In addition, Counts Fifteen through Twenty-two charged him with eight separate incidents of mail fraud relating to the mailing of false audit confirmation cards. Count Twenty-nine charged Skinner with causing information to be kept from the IRS. This charge was based on the scheme to keep banks from reporting transactions of over $10,000 by purchasing multiple cashier's checks under that amount in a single day. Counts Forty through Forty-three charged Skinner with four incidents of interstate transportation of false securities because he transported cashier's checks bearing forged endorsements from Missouri to Illinois.

On April 28, 1983, following a fourteen-day jury trial, Massa and Skinner were convicted of all counts charged against them in the indictment.[2] Massa was sentenced to twenty years imprisonment, $45,000 in fines and five years probation. Skinner received an aggregate sentence of twelve years imprisonment, $22,000 in fines and five years probation. After the relevant post-trial motions were submitted and denied, Massa and Skinner filed this joint appeal.

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[2] Miller pled guilty as a result of an agreement with the government on October 8, 1982.

II. DISCUSSION

We will first discuss the arguments raised by both defendants concerning the alleged variance between the indictment and the proof at trial and the admissibility of Brimberry's hearsay statements. We will then address both defendants' sufficiency of the evidence arguments in turn. Finally, we will consider Skinner's challenges based on the federal rules governing severance and the Speedy Trial Act.[3]

A. Arguments Raised by Both Defendants.

1. Variance.

Where an indictment alleges a single conspiracy and the government proves the existence of multiple conspiracies, the conviction must be reversed if the variance affects substantial rights of the accused. *Kotteakos* v. *United States,* 328 U.S. 750, 756-757 (1946); *United States* v. *Lemm,* 680 F.2d 1193, 1202-1203 (8th Cir. 1982), *cert. denied,* 103 S.Ct. 739 (1983); *United States* v. *Coward,* 630 F.2d 229, 231 (4th Cir. 1980). In determining whether multiple conspiracies rather than a single one have been proved, "[t]he general test is whether there was 'one overall agreement' to perform various functions to achieve the objectives of the conspiracy." *United States* v. *Zemek,* 634 F.2d 1159, 1167 (9th Cir. 1980), *cert. denied,* 450 U.S. 916 (1981); *accord United States* v. *Lemm, supra,* 680 F.2d at 1203; *United States* v. *Morrow,* 537 F.2d 120, 126 (5th Cir. 1976), *cert. denied,* 430 U.S. 956 (1977). A conspirator need not know all of the other conspirators or be aware of

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[3] In considering these issues, we view the evidence in the light most favorable to the jury's verdict. *Glasser* v. *United States,* 315 U.S. 60, 80 (1942).

all the details of the conspiracy, so long as the evidence is sufficient to show knowing contribution to the furtherance of the conspiracy. *E.g., United States* v. *Lemm, supra*, 680 F.2d at 1204.

Both defendants contend that no single unitary scheme with a common aim was proved at trial. Rather, they maintain the evidence showed distinct conspiracies involving different individuals with different purposes. Massa identifies three such conspiracies: (1) a conspiracy to defraud Stix by manipulating the margin accounts and placing bogus stock in the vault, which allegedly involved Brimberry and his wife and arguably Maeras and Miller; (2) a conspiracy by Massa and Brimberry to conceal from the IRS Brimberry's assets and income; and (3) a similar conspiracy by Skinner, Brimberry, Maeras and Miller to conceal the assets and income of Maeras, Miller and Brimberry.

The defendants' attempts to characterize different aspects of the scheme to loot Stix as separate conspiracies are unpersuasive. The conspirators had one primary goal: to steal from the brokerage firm and spend the money undetected. This single conspiracy did not become a multiple conspiracy simply because the ambitious scope of the scheme demanded subsidiary action. Moreover, both Massa and Skinner were intimately connected to the enterprise as a whole and that the conspiracy's goals remained steady from its inception in 1976 until its discovery in 1981. *See, e.g., United States* v. *Lemm, supra*, 680 F.2d at 1203; *United States* v. *Winter*, 663 F.2d 1120, 1136 n.25 (1st Cir. 1981).

Both Massa and Skinner facilitated and benefited from the illegal activity at the heart of the conspiracy: the manipulation of the ten margin accounts at Stix. Massa obstensibly owned two of the accounts and borrowed money

on the fraudulent collateral for his own personal use. His purchase of a controlling interest in Stix, with money embezzled from the firm, allowed larger amounts of money to be siphoned off the fraudulent accounts, as did the fictitious subordinated loans he arranged. Although Skinner did not have a Stix account, he fronted corporations funded by money embezzled from the accounts. Massa was an officer and shareholder in most of these corporations. Skinner also, at least on one occasion, helped Janice Brimberry obtain blank securities that were later forged and placed in the Stix vault. They were thus both intimately connected to the looting phase of the conspiracy.

Massa and Skinner also worked together with the other participants in the scheme to conceal its fruits from the IRS and other governmental agencies. Massa extended Brimberry a "loan" from stolen Stix money to disguise the source of the funds used to build the Brimberry mansion. Skinner helped to launder other Stix funds so that they could not be traced to Brimberry. In addition, Skinner prepared Massa's income tax during the years of the conspiracy, knowingly and consistently misrepresenting the extent and source of Brimberry's wealth.

We conclude that there was no variance between the single conspiracy alleged in the indictment and the proof at trial. The government charged one overall agreement to loot Stix and conceal the scheme. We decline the defendants' invitation to divide artificially this single scheme into separate conspiracies for each phase and each participant. Because we find no variance, it is unnecessary to address the prejudice prong of the defendants' arguments.

2. Brimberry's Out-of-Court Statements.

Thomas Brimberry did not testify at the trial of Massa and Skinner, but his out-of-court statements were admitted through the testimony of other principals in the scheme--

Janice Brimberry, Maeras and Miller. Both Skinner and Massa challenge the admission of these statements based on Fed. R. Evid. 801(d)(2)(E) and the confrontation clause of the sixth amendment.

a. Rule 801(d)(2)(E)

Coconspirator statements are admissible under Fed. R. Evid. 801(d)(2)(E) if a preponderance of the independent evidence demonstrates that they were made during the course and in furtherance of a conspiracy to which the defendant and the declarant were parties.[4] *United States* v. *Nelson*, 603 F.2d 42, 44 (8th Cir. 1979); *United States* v. *Bell*, 573 F.2d 1040, 1043 (8th Cir. 1978). Skinner argues that Brimberry's coconspirator statements should have been excluded because they were not made in furtherance of the conspiracy.[5] We disagree. This requirement for admissibility is afforded broad construction. *E.g., United States* v. *Bentley*, 706 F.2d 1498, 1506 (8th Cir. 1983), *cert. denied*, 104 S.Ct. 2397 (1984); *United States* v. *Harris*, 546 F.2d 234, 237-238 (8th Cir. 1976). Skinner has not cited an example of any of Brimberry's statements that did not further the goals of the conspiracy, and we have not found any in our search of the record. All of the

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[4] Rule 801(d)(2)(E) provides:

(d) *Statements which are not hearsay.* A statement is not hearsay if—

(2) Admission by party-opponent. The statement is offered against a party and is * * * (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

[5] Skinner also contends that the trial court did not make the explicit ruling on the record required by *United States* v. *Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978). The trial court did, however, make this ruling, both at the end of the government's case and at the end of trial. (11 Tr. 28, 29; 12 Tr. 157)

admitted statements were made to other participants in the scheme and either explain events important to the conspiracy or give directions to facilitate it. We therefore reject Skinner's Rule 801(d)(2)(E) argument for excluding these statements.

Massa contends these statements should not have been admitted against him under the federal rules because there was insufficient independent evidence that he was a part of the conspiracy. He specifically maintains the government did not show he knowingly participated in the conspiracy. As discussed in a later section, we believe the government did prove beyond a reasonable doubt that Massa was a knowing participant. To satisfy Rule 801(d)-(2)(E), however, the government did not have to show Massa's connection to the scheme beyond a reasonable doubt, but only by a preponderance of the independent evidence. We think the independent evidence presented was more than sufficient to meet this standard. Documentary evidence and stipulations showed that $7 million worth of securities in Massa's accounts were fraudulent, that Massa obtained $2.5 million of Stix's money for his own use, and that Massa used money withdrawn from the Stix margin accounts to buy controlling interest in Stix. This documentary evidence, together with testimony linking Massa to the fraudulent subordinated loans, satisfies the preponderance of the evidence standard. We therefore hold these statements were admissible under the federal rules.

b. The Confrontation Clause.

Even if Brimberry's statements were admissible under the federal rules, Skinner and Massa argue their admission violated the right to confrontation contained in the sixth amendment. For support, they rely primarily on the Supreme Court's decision in *Ohio* v. *Roberts,* 448 U.S. 56 (1980). *Roberts* held that

> when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Id. at 66 (footnote omitted).

The defendants in the instant case contend that the trial court should have excluded Brimberry's statements because neither of the *Roberts* criteria was met: Brimberry was available to testify and his hearsay statements were unreliable.

The first question is whether the *Roberts* requirements apply to the admission of coconspirator statements or whether, as the government argues, availability and reliability are only requisites when the prosecution seeks to introduce prior testimony from a preliminary hearing—the exact factual circumstances in *Roberts*. It is clear that the *Roberts* Court sought to establish an approach to confrontation clause issues applicable to a range of cases beyond the particular facts before the Court at the time. The Court stated that it had been called upon "to consider once again the relationship between the Confrontation Clause and the hearsay rule with its *many* exceptions." *Id.* at 62 (emphasis added). It noted that the confrontation clause read literally would abrogate all hearsay exceptions, but that the Court had historically sought to reconcile the sixth amendment interest in face-to-face confrontation and right to cross-examination with the interests in law enforcement and precise evidentiary rules which underly the hearsay exceptions. *Id.* at 63-64. These

competing interests are implicated no matter what hearsay exception is used to justify the admission of an out-of-court statement. Consequently, the *Roberts* requirements apply to a broad range of cases.

Nor is there any reason to specifically exclude coconspirator statements from *Roberts* requisite showing of unavailability and reliability. While it is true that *Roberts* specifically addressed hearsay *exceptions*, the same interest in face-to-face confrontation is at stake when the out-of-court statements of coconspirators are admitted as *non-hearsay* under the agency theory of Fed. R. Evid. 801(d)-(2)(E). Indeed, coconspirator statements may be more in need of scrutiny under the confrontation clause precisely because, unlike hearsay exceptions, they are not admissible because of their inherent reliability. *See United States* v. *Ammar*, 714 F.2d 238, 255-256 (3d Cir.), *cert. denied*, 104 S. Ct. 344 (1983); Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 Harv. L. Rev. 1378, 1385-1391 (1972). Thus, the Ninth, Third and Fifth Circuits have all analyzed confrontation clause challenges to the admission of coconspirator statements using the requisites of unavailability and reliability set forth in *Roberts*. *See United States* v. *Arbelaez*, 719 F. 2d 1453, 1460 (9th Cir. 1983); *United States* v. *Ammar*, *supra*, 714 F.2d at 255; *United States* v. *Peacock*, 654 F.2d 339, 349 (5th Cir. 1981).

The second question then is whether the *Roberts* requirements were met in this case. We turn first to the defendants' contention that Brimberry's statements were not reliable. Initially, we note that the coconspirator rule is not "a firmly rooted hearsay exception" from which "reliability can be inferred without more." *See Ohio* v. *Roberts*, *supra*, 448 U.S. at 66. The Federal Rules of Evidence categorize coconspirator statements along with

admissions as "[s]tatements which are not hearsay." Fed. R. Evid. 801(d)(2). Admissions are not admitted because of confidence in their inherent reliability; rather, they are admitted because "a party will not be heard to object that s/he is unworthy of credence." *United States* v. *Ammar*, *supra*, 714 F.2d at 255; McCormick, *Handbook of the Law of Evidence* § 262 at 628-629 (2d ed. 1972). Thus, the confrontation clause inquiry is not equivalent to the Rule 801 inquiry.

Factors relevant to determining reliability include: (1) whether the context of the statements and the persons to whom they were made suggest that they were reliable; (2) whether the declarant had a motive for lying or problems with his or her memory, perception or expression; and (3) whether the declarant had personal knowledge of the identity and role of the participants in the crime. *United States* v. *Ammar*, *supra*, 714 F.2d at 256; *United States* v. *Kiefer*, 694 F.2d 1109, 1113 (9th Cir. 1982); *United States* v. *Perez*, 658 F.2d 654, 661 (9th Cir. 1981).

Although the Brimberry's out-of-court statements were made from personal knowledge and in furtherance of the conspiracy and were corroborated by other evidence, we agree with the defendants that Brimberry's behavior after the scheme was discovered casts doubt on the reliability of any of his statements. Brimberry originally made a deal to testify for the government. He allegedly lied to the grand jury, however, and the deal was voided. He was subsequently indicted for obstruction of justice and making false statements. The government does not contest the defendants' assertion that it did not call Brimberry to testify precisely because he was unreliable. Brimberry's penchant for lying no matter what was at stake, may be the type of unusual circumstance which would re-

quire the exclusion of his out-of-court statements under the confrontation clause despite their admissibility under Rule 801(d)(2)(E).

The record also raises serious questions about Brimberry's availability. The government recognized on the record that Brimberry had offered to testify.[6] In *Roberts*, the Supreme Court stated "if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation." *Ohio* v. *Roberts, supra*, 448 U.S. at 74 (emphasis in original). Thus, the government may have been obligated to make Brimberry available for cross-examination in order to use his out-of-court statements in conformity with the confrontation clause.

Notwithstanding the doubts expressed above, we need not decide the propriety of admitting Brimberry's statements because we believe any error was harmless beyond

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[6] This raises the additional question, not pressed by the government in its brief, of whether the confrontation clause prevents the use of hearsay statements when the declarant is available to both sides. Two Ninth Circuit pre-*Roberts* cases imply that it does not: *United States* v. *Weiner*, 578 F.2d 757, 771 (9th Cir.), *cert. denied*, 439 U.S. 981 (1978) (declarant actually called by defense but he asserted fifth amendment privilege); *United States* v. *Snow*, 521 F.2d 730, 736 (9th Cir. 1975), *cert. denied*, 423 U.S. 1090 (1976) (no need to call witness equally available to both sides).

We read *Roberts*, however, to place the burden on the government to make available for cross-examination a witness whose out-of-court statements it is using against the defendant. The Court stated: "[A] witness is not 'unavailable' for purposes of . . . the exception to the confrontation requirement unless the prosecutorial authorities have made a *good faith effort* to obtain his presence at trial * * *." *Ohio* v. *Roberts*, 448 U.S. 56, 74 (1980) (citations omitted; emphasis in original). Thus, it is the government's burden to obtain the available hearsay declarant's presence at trial, although it need not call the witness to testify. *Id.* at 66.

a reasonable doubt. *See United States* v. *Hastings*, 103 S. Ct. 1974, 1980 (1983); *Schneble* v. *Florida*, 405 U.S. 427, 432 (1972); *Harrington* v. *California*, 395 U.S. 250, 253 (1969). Both defendants claim Brimberry's out-of-court statements prejudiced them, but only Massa offers an example. Coconspirator Miller testified that when he threatened to go to the IRS and Stix with information, Brimberry told him he would get Massa, Maeras, Brimberry and others in trouble. According to Massa, grouping him with these other clearly guilty parties in this context severely prejudiced his case. We do not agree.

Other reliable, nonhearsay evidence linked Massa to these three men and the fraud at Stix. Documentary evidence showed Maeras, Miller and Massa were the purported owners of the padded margin accounts at Stix. In addition, the other coconspirators testified from personal experience about Massa's involvement. For example, Janice Brimberry's testimony linked Massa to the fraud itself and to Brimberry. She testified that she typed Massa's name on blank stock certificates and that she and Tom Brimberry received a $250,000 check from Massa for their mansion in Granite City. Maeras testified that Massa told him to forge A. E. Shaw's name on the bogus loan documents out of the sight of his secretary. Miller attended meetings with Maeras, Massa and Brimberry at Miller Excavating, a corporation fronted by Skinner and funded with embezzled Stix funds. When viewed in the context of all of the evidence tying Massa to the Stix fraud and to the other conspirators, the statement that Miller would get Maeras, Miller and Brimberry in trouble by going to the authorities is hardly damaging enough to require reversal.

Our review of the record reveals that the other out-of-court statements attributed to Brimberry were not harmful to either Massa's or Skinner's defenses. Maeras testi-

fied that Brimberry directed him to make cashier's checks payable to Massa from the false Stix accounts. This testimony did not involve hearsay because Brimberry's statements were not offered for the truth of the matter asserted, but rather as Maeras' explanations for his own action. Maeras himself could be cross-examined on that point. Janice Brimberry testified that Thomas Brimberry told her Massa would loan them $250,000 for their home and that Brimberry and Massa arranged to buy stock together at Stix registered in Massa's name. Other nonhearsay evidence also established these facts and the defense did not dispute them. Instead, it maintained that Massa did not know Brimberry was running a scheme to loot Stix. Aside from the statement discussed above, Miller did not relay any statements made by Brimberry which implicated Massa or Skinner or added anything new to other evidence of their involvement in the scheme. Thus, a review of the testimony of the three coconspirators demonstrates that the admission of Brimberry's statements if erroneous was harmless beyond a reasonable doubt.

To summarize, we hold Brimberry's out-of-court statements were admissible under rule 801(d)(2)(E). While Brimberry's reliability and unavailability may not have been established to the satisfaction of the confrontation clause, we hold any error in this regard to be harmless beyond a reasonable doubt.

B. Massa's Arguments.

In addition to the above issues, which Massa and Skinner both raise, Massa challenges the sufficiency of the evidence against him. Specifically, he contends the government has failed to prove the requisite criminal intent. He also maintains the jury convicted him despite the government's failure of proof because the court improperly in-

structed the jury that Massa's knowledge of the scheme could be inferred from his willful blindness. The prejudicial effect of this instruction was aggravated, Massa argues, by the government's reliance on it during final argument. We disagree with these contentions.

1. Sufficiency of the Evidence.

Massa's entire sufficiency of the evidence argument hinges on the assertion that the government had to prove he knew how Brimberry embezzled the money from Stix in order to convict him of participation in the scheme. According to Massa, the "essential nature" of the conspiracy was the agreement to manipulate the fictitious security positions in the ten accounts at Stix. Because the government produced no direct evidence that Massa knew of, or participated in, the creation or manipulation of these accounts, Massa argues he should not have been convicted of conspiracy. Furthermore, he maintains the substantive counts must also fail because they all presuppose his knowledge of the specifics of Brimberry's scheme.

We think the evidence was sufficient for the jury to infer that Massa at least knew that his own margin accounts at Stix were being padded with false collateral. Janice Brimberry testified that she typed forged collateral for Massa's account as early as 1976. Massa, a sophisticated investor who kept records of his accounts, received monthly statements showing this false collateral. When the scheme was discovered, his account had been padded with over $7 million worth of fictitious securities. Although he invested only $60,000 in the account, he withdrew over $2.5 million from it during the course of the scheme. He explained his miraculous acquisition of capital as due simply to Brimberry's largess. Moreover, when the fraud was un-

covered, the president of Stix called Massa in Las Vegas to tell him that millions of dollars in securities were missing. Massa reacted without concern and never returned to the firm. In our view, the evidence was sufficient for the jury to conclude that Massa knew the accounts Brimberry managed at Stix were padded with false collateral.

Moreover, we think the essential nature of the conspiracy was broader than the scheme to manipulate the margin accounts; the goal was to embezzle money from Stix using a variety of strategies and hide the attendant wealth. The evidence shows Massa was deeply involved in this overall scheme. Using money embezzled from the margin accounts, Massa bought controlling interest in Stix. He used his power to place Brimberry in absolute control of the margin accounts and the flow of cash from the firm, telling senior officers at Stix to follow Brimberry's orders at the risk of being fired. Thereafter, the amount of money taken from the firm increased substantially. When the firm's independent auditors seemed to be on the verge of discovering the fraud, Massa told Brimberry to "fire the auditors." Massa also caused subordinated loans to be made to Stix which were actually funded with money stolen from Stix. The purpose of the loans was to increase the capital of the firm, allowing the conspirators to embezzle more money, while avoiding detection by the regulatory authorities. Thus, there was ample evidence for the jury to find Massa knew of, and participated in, the overall scheme to loot Stix.

We see no need to recount all of the evidence tending to support the various counts in the indictment. Massa for the most part limited his challenge to the government's alleged failure to prove he knew of Brimberry's manipula-

tion of the margin accounts at Stix.[7] Because we find the evidence more than sufficient to prove Massa knowingly participated in the overall scheme, we reject his challenge.

2. Instructions.

Massa raises two objections to the court's instructions. First, he maintains the court erred in refusing to instruct the jury that the government had to prove Massa possessed actual knowledge of the fictitious securities to be convicted of all counts. As stated above, we do not agree that such an instruction states the government's burden. The jury could find Massa was a knowing participant in the Stix fraud without finding he knew exactly how Brimberry withdrew money from the firm. Thus, the trial court did not err in refusing to give this instruction.

Second, Massa objects to the following instruction which the trial court gave to the jury:

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[7] As a sub-issue of sufficiency of the evidence, Massa challenges his conviction on four of the mail fraud counts against him because the act alleged is the mailing of audit confirmation cards from outside auditors to Massa. He argues that these mailings did not further the purposes of the scheme and hence were not unlawful. *See Kann* v. *United States*, 323 U.S. 88 (1944). We disagree. In order to sustain a charge of mail fraud under 18 U.S.C. § 1341, the government must prove (1) the existence of a scheme to defraud, and (2) the use of the mails for the purpose of executing the scheme. To satisfy the second element, it is enough that the use of the mails could reasonably be foreseen. *United States* v. *Kaminski*, 692 F.2d 505, 511 (8th Cir. 1982). In the instant case, both the mailing and return of the audit cards furthered the scheme by misleading the independent auditors. Since Massa could have foreseen that audit cards would be sent out on his fictitious accounts, he caused the mailings for purposes of the statute. Thus, the two elements of the charge were proven.

> The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him. A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from willful blindness to the existence of a fact.
>
> It is entirely up to you as to whether you find any deliberate closing of the eyes, and the inferences to be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge.

Massa contends this instruction allowed the jury to convict on an objective or "should have known" theory, instead of the subjective knowledge theory required in criminal cases.

Several circuits, including our own, have approved similar instructions which allow the jury to infer the element of knowledge from deliberate indifference. *United States* v. *Kershman,* 555 F.2d 198, 200 (8th Cir.), *cert. denied,* 434 U.S. 892 (1977); *United States* v. *Jewell,* 532 F.2d 697, 700 (9th Cir.), *cert. denied,* 426 U.S. 951 (1976); *United States* v. *Dozier,* 522 F.2d 224, 226-227 (2d Cir.), *cert. denied,* 423 U.S. 1021 (1975); *United States* v. *Thomas,* 484 F.2d 909, 912-914 (6th Cir.), *cert. denied,* 414 U.S. 912 (1973). In these circumstances, this instruction was particularly appropriate because both defendants testified that they did not know of the scheme to defraud Stix, in the face of strong evidence to the contrary. Moreover, jury instructions are to be construed as a whole. *E.g., United States* v. *Rabbitt,* 583 F.2d 1014, 1024 (8th Cir. 1978), *cert. denied,* 439 U.S. 1116 (1979). The jury was repeatedly instructed that it could not find Massa guilty unless it

found beyond a reasonable doubt that Massa specifically intended his actions.[8] Given this context, we find no merit to Massa's argument that the above quoted instruction was improperly given in this case.

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[8] Instruction number 18 provided:

> An act is done "knowingly" if done [voluntarily] and intentionally, and not because of mistake or accident or other innocent reason.
>
> The purpose of adding the word "knowingly" is to insure that no one will be convicted for an act done because of mistake, or accident, or other innocent reason.

Instruction number 19 provided:

> An act is done "willfully" if done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.

Instruction number 36 provided:

> The crime charged in this case is a serious crime which requires proof of specific intent before the defendant can be convicted. Specific intent, as the term applies, means more than the general intent to commit the act. To establish specific intent, the Government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

Instruction number 44 provided:

> The words "scheme, tricks and device" must be considered together with the words "knowingly" and "willfully". An act is done "knowingly" if done voluntarily and intentionally and not because of mistake or accident or other innocent reason. An act is done "willfully" if done voluntarily and intentionally and with specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law. The word "knowingly" is added in order to insure that no one would be convicted because of mistake or accident or other innocent reason.

Neither can we agree with Massa's related contention that the government misled the jury in final argument by stating that the defendants' knowledge could be inferred from their willful blindness. The government legitimately relied on this theory given the facts of the case. Nowhere in its final argument does the government state that it did not have to prove knowledge, or that a "should have known" standard suffices. We thus conclude the argument was proper.

We have considered all of the arguments raised by Massa and conclude that (1) no variance exists between the conspiracy charged in the indictment and the proof at trial; (2) it was not reversible error to admit Brimberry's out-of-court statements; and (3) the evidence against Massa is sufficient to sustain his conviction. We thus affirm his conviction on appeal.

C. Skinner's Arguments.

In addition to the arguments he asserts in common with Massa, Skinner contends that the trial court erred in initially ruling that he and Massa should be tried together under Fed. R. Crim. P. 8(b) and thereafter denying his motion for severance under Fed. R. Crim. P. 14. Skinner also maintains that he was deprived of his right to a speedy trial and that the government failed to prove various counts in the indictment. We examine each of these arguments in turn.

1. Misjoinder and Severance.

Rule 8(b) in the Federal Rules of Criminal Procedure balances the right of the accused to a fair trial and the public's interest in the efficacious administration of justice. *United States* v. *Zicree*, 605 F.2d 1381, 1386 (5th Cir.

1979), *cert. denied,* 445 U.S. 966 (1980). The rule provides:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

The propriety of joinder is to be determined from the face of the indictment. *Schaffer* v. *United States,* 362 U.S. 511, 514 (1960). The factual allegations in the indictment must be accepted as true. *United States* v. *Zicree, supra,* 605 F.2d 1387. One exception for going behind the allegations on the face of the indictment in deciding whether joinder is proper is if the indictment alleges a single conspiracy, but the facts alleged in the indictment show multiple conspiracies. *United States* v. *Levine,* 546 F.2d 658, 663 (5th Cir. 1977). The *Levine* Court found misjoinder as a matter of law because the government rested its conspiracy count on the "false legal premise that proof of proximate or simultaneous conspiracies with one common conspirator was sufficient to establish the existence of a single conspiracy." *Id.* at 665.

Skinner urges us to apply the *Levine* rule and find misjoinder in this case because, in his view, the facts alleged in the indictment show multiple conspiracies and schemes even though only one was alleged. We do not agree. As we noted in the section of this opinion discussing the defendants' variance claim, this conspiracy involved subsidiary schemes bound together by one common goal—to defraud Stix and hide the illgotten gains. Because the indictment on its face alleges one conspiracy involving both Skinner and Massa, joinder was proper under Rule 8(b).

We also find the trial court did not err in denying Skinner's motion for severance under Fed. R. Crim. P. 14. Severance is proper where a defendant demonstrates that a jury could not reasonably be expected to compartmentalize the evidence as it relates to separate defendants. *United States* v. *Reed*, 658 F.2d 624, 629 (8th Cir. 1981), *cert. denied*, 455 U.S. 1002 (1982). The decision to sever is within the sound discretion of the trial judge and its denial is not subject to reversal unless clear prejudice is shown. *United States* v. *Schroeder*, 433 F.2d 846, 851 (8th Cir. 1970). We find no such clear prejudice in this case. Skinner has offered no meritorious reason why the jury could not compartmentalize the evidence relevant to him. Accordingly, we conclude the defendants were properly tried together.

2. Sufficiency of the Evidence.

Skinner challenges the sufficiency of the government's evidence on the following counts: Count Twenty-nine which charged him with illegally concealing currency transactions exceeding $10,000 in a single day in violation of 18 U.S.C. § 1001 (1982); Counts Fifteen through Twenty-two which charged him with mail fraud in violation of 18 U.S.C. § 1341 (1982); and Counts Forty through Forty-three which charged him with transportation of forged securities in violation of 18 U.S.C. § 2314 (1982). We find the government's proof sufficient on Counts Twenty-nine and Fifteen through Twenty-two. For the reasons stated below, however, we reverse Skinner's conviction on Counts Forty through Forty-three for the transportation of forged securities.

a. Count Twenty-nine.

Section 1001 prohibits individuals from devising any scheme to conceal or cover up material facts within the

jurisdiction of an agency of the government.[9] Federal law requires banking institutions to report the name and address of individuals dealing in amounts of cash in excess of $10,000. Count Twenty-nine alleges that Skinner and others devised a scheme for avoiding this reporting requirement and thus concealing a material fact by going to various banks on a single day and buying cashier's checks for less than $10,000 at each bank. For example, on April 11, 1980, Skinner purchased cashier's checks at nine different banks for a total of $60,000; and on April 30, 1980, he went to five banks and purchased cashier's checks in an amount less than $10,000 for a total of $37,500. Janice Brimberry testified that the purpose of this subterfuge was to avoid detection by the IRS.

Skinner protests that his failure to cumulate the various cashier's checks he "purchased from time to time" states no violation of federal law because the banking regulations put no duty on the taxpayer to assist financial institutions in carrying out their reporting duties. We find no merit in this contention. Skinner's clear purpose was to hide information from the IRS using the device of multiple cash transactions. His conviction on this count was therefore proper.

---

[9] 18 U.S.C. § 1001 states in its entirety:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

b. Counts Fifteen through Twenty-two.

These counts charge Skinner with mail fraud in connection with the mailing of audit confirmation cards. Four of the counts allege audit confirmation cards were mailed to a post office box in Illinois. The other four counts allege the cards were mailed back to the Stix auditors. The cards were addressed to Arthur Miller, Jr., the ostensible owner of one of the fraudulent accounts at Stix. Skinner received the mail addressed to that account. The cards that were mailed back falsely stated that the accounts were accurate. Skinner argues that these mailings did not violate the mail fraud statute because they were not sufficiently related to the overall scheme and the government failed to prove that Skinner caused these cards to be mailed. We think the evidence was sufficient for the jury to find these mailings constituted mail fraud.

The mail fraud statute prohibits the use of the mails "for the purpose of executing" a scheme to defraud.[10]

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[10] 18 U.S.C. § 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

To come within the statute "[i]t is not necessary that the scheme contemplated the use of the mails as an essential element." *Pereira* v. *United States*, 347 U.S. 1, 8 (1954). Rather, it is enough if the mailing is "incident to an essential part of the scheme." *Id.*, *quoted in United States* v. *Lebovitz*, 669 F.2d 894, 896 (3d Cir.), *cert. denied*, 456 U.S. 929 (1982). "Mailings which are designed to lull victims into a false sense of security, postpone inquiries or complaints, or make the transaction less suspect are mailings in furtherance of the fraudulent scheme under the mail fraud statute." *United States* v. *Tackett*, 646 F.2d 1240, 1243 (8th Cir. 1981). Clearly, the mailings to and from the Stix auditors fit in this category. As we stated previously, a central concern in the scheme was to fool the auditors. The sending and receiving of audit confirmation cards was integral to this concern. Accordingly, the jury could have found the mailings furthered the scheme.

We also find sufficient evidence that Skinner caused the mailings within the meaning of the statute. He need not have personally mailed the cards; it is enough if he committed "an act with knowledge that the use of the mails would follow in the ordinary course of business, or where such use could reasonably be foreseen, even though not actually intended." *United States* v. *Kaminski*, 692 F.2d 505, 511 (8th Cir. 1982); *Pereira* v. *United States*, *supra*, 347 U.S. at 8-9. Moreover, once Skinner became a party to the scheme, he could be held accountable for mailings caused by other members, whether or not he knew of or agreed to any specific mailing. *United States* v. *Wormick*, 709 F.2d 454, 461 (7th Cir. 1983). Here, it could be reasonably foreseen by any participant in the scheme that the Stix auditors would mail audit confirmation cards and they would have to be returned. The causation element is

thus satisfied and Skinner's conviction on the mail fraud counts is affirmed.

c. Counts Forty through Forty-three.

Counts Forty through Forty-three charged Skinner with the transportation in interestate commerce of "falsely made and forged securities, to wit: certain cashier's checks bearing the forged endorsement of Ron Stone" in violation of 18 U.S.C. § 2314. Because forged endorsements on otherwise valid securities do not make the instruments themselves forged securities under section 2314, we must reverse Skinner's conviction on these counts.[11]

Section 2314 provides in relevant part:

> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered or counterfeited; • • •
>
> Shall be fined not more than $10,000, or imprisoned not more than ten years, or both.

In *Streett* v. *United States*, 331 F.2d 151, 157 (8th Cir. 1964), we held that Congress intended in this section to reach only forged securities, not forged endorsements and that, once a security was complete, the addition of a forged endorsement did not serve to make it a forged security. *Accord United States* v. *Tyson*, 690 F.2d 9, 14 (1st Cir. 1982); *United States* v. *Sciortino*, 601 F.2d 680, 682-683 (2d Cir. 1979); *United States* v. *Simpson*, 577 F.2d 78, 81 (9th Cir. 1978).

---

[11] Our reversal of these counts against Skinner makes it unnecessary for us to consider whether the grand jury testimony of Ron Stone was admissible under Fed. R. Evid. 804(b)(5), another issue raised by Skinner. Stone's testimony was only relevant to these counts.

In 1968, Congress amended section 2314 in response to the *Streett* decision and pressure from the traveler's check industry to specifically prohibit the transportation with unlawful or fraudulent intent in interstate commerce of any traveler's check bearing a forged countersignature, regardless of its value, 18 U.S.C. § 2314 ¶ 4; *see* H.R. Rep. No. 1728, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News, 3654, 3654-3657. Courts considering the 1968 amendment have concluded that Congress intended to overrule the *Streett* principle as to traveler's checks only. *See United States* v. *Tyson, supra,* 690 F.2d at 13-14; *United States* v. *Sciortino, supra,* 601 F.2d at 682; *United States* v. *Simpson, supra,* 577 F.2d at 81. We are inclined to agree. When faced with the *Streett* decision, Congress could have altered paragraph three of section 2314 to specifically include forged endorsements. Instead, it made traveler's checks a specific exception by adding a paragraph covering that type of security. We thus conclude, with our sister circuits, that the provision for forged or falsely made securities set forth in paragraph three excludes all false endorsements not included in paragraph four.[12]

Because Skinner's transportation of cashier's checks with forged endorsements did not constitute transportation of forged or fraudulently made securities, we reverse his conviction on Counts Forty through Forty-three. We agree with the government, however, that the proof offered on those counts was not prejudicial and does not require the reversal of any of Skinner's other counts.

---

[12] The government might have charged Skinner with a violation of paragraph one of section 2314, which prohibits the knowing interstate transportation of security "converted or taken by fraud" if its value exceeds $5,000. The indictment clearly charged Skinner with a violation of paragraph three, however.

3. Speedy Trial Act.

Skinner's final contention on appeal is that he was deprived of his right to a speedy trial under 18 U.S.C. § 3161(c) (1982). Although the period of time between Skinner's indictment and trial exceeded the seventy-day time limit in section 3161(c), we are satisfied from our review of the record that the motions of the defendants and the trial court's finding that a continuance was proper under section 3161(h)(8)(A) tolled the limitation period in the Act. We thus find no merit in Skinner's contention that the court did not comply with the Speedy Trial Act.

Thus, after considering the various arguments Skinner has raised on appeal, we affirm his conviction on all counts except Counts Forty through Forty-three.

III. CONCLUSION.

We affirm Massa's conviction on all counts. Viewing the evidence in a light most favorable to the jury's verdict, it is clear that Massa knowingly participated in the single overall conspiracy to defraud Stix and hide the proceeds. Skinner's conviction is affirmed in part and reversed in part. We find the evidence sufficient on all but the transportation of forged securities counts.

Accordingly, the judgment is reversed in part and affirmed in part.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 83/1756/1803-EM. September Term, 1984

UNITED STATES OF AMERICA,
Appellee,

vs.

JAMES MASSA,
DUANE SKINNER,
Appellants.

Appeals from the United States District Court for the Eastern District of Missouri

---

The petitions for rehearing en banc filed by appellants' James Massa and Duane Skinner in the above cases have been considered by the Court and are denied.

Petitions for rehearing by the panel are also denied.

October 2, 1984

APPENDIX C

United States Constitution, Amendment VI.

Jury Trial For Crimes, and Procedural Rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, ex-

change, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

15 U.S.C. § 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necesary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78q. Records and reports

Rules and regulations

(a)(1) Every national securities exchange, member thereof, broker or dealer who transacts a business in securities through the medium of any such member, registered securities association, registered broker or dealer, registered municipal securities dealer, registered securities information processor, registered transfer agent, and registered clearing agency and the Municipal Securities Rule-making Board shall make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the puposes of this chapter.

(2) Every registered clearing agency shall also make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports, as the appropriate regulatory agency for such clearing agency, by rule, prescribes as necessary or appropriate

for the safeguarding of securities and funds in the custody or control of such clearing agency or for which it is responsible.

(3) Every registered transfer agent shall also make and keep for prescribed periods such records, furnish such copies thereof, and make such reports as the appropriate regulatory agency for such transfer agent, by rule, prescribes as necessary or appropriate in furtherance of the purposes of section 78q-1 of this title.

15 U.S.C. § 78ff. Penalties

Willful violations; false and misleading statements

(a) Any person who willfully violates any provision of this chapter (other than section 78dd-1 of this title), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than five years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

Failure to file information, documents, or reports

(b) Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 78o of this title or any rule or regulation thereunder shall forfeit to the United States the sum of $100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

Violations by issuers, officers, directors, stockholders, employees, or agents of issuers

(c)(1) Any issuer which violates section 78dd-1(a) of this title shall, upon conviction, be fined not more than $1,000,000.

(2) Any officer or director of an issuer, or any stockholder acting on behalf of such issuer, who willfully violates section 78dd-1(a) of this title shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

(3) Whenever an issuer is found to have violated section 78dd-1(a) of this title, any employee or agent of such issuer who is a United States citizen, national, or resident or is otherwise subject to the jurisdiction of the United States (other than an officer, director, or stockholder of such issuer), and who willfully carried out the act or practice constituting such violation shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

(4) Whenever a fine is imposed under paragraph (2) or (3) of this subsection upon any officer, director, stockholder, employee, or agent of an issuer, such fine shall not be paid, directly or indirectly, by such issuer.

28 U.S.C. § 2111. Harmless error

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Federal Rule of Criminal Procedure 12. Pleadings and Motions before Trial; Defenses and Objections

(b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial: . . .

> (2) Defenses and objections based on defects in the indictment or information (other then it fails to show jurisdiction in the court or to change an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); . . .

(2)

No. 84-995

FILED
MAR 13 1985
ALEXANDER L. STEVAS

In the Supreme Court of the United States

OCTOBER TERM, 1984

JAMES MASSA, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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28 pp

QUESTIONS PRESENTED

1. Whether the court of appeals properly concluded that any error in the admission of out-of-court statements by one of petitioner's co-conspirators, who did not testify, was harmless.

2. Whether the trial court committed plain error in instructing the jury that it could infer knowledge from proof that petitioner "deliberately closed his eyes to what would otherwise have been obvious to him" without "balancing" that instruction.

3. Whether the "sale of business" doctrine invalidates petitioner's conviction for securities fraud.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 740 F.2d 629.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 1984. A petition for rehearing was denied on October 2, 1984 (Pet. App. 35a). On November 26, 1984, Justice Blackmun extended the time within which to file a petition for a writ of certiorari until December 28, 1984, and the petition was filed on December 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on all 29 counts against him in an indictment charging, inter alia, a conspiracy to defraud Stix & Company, a

St. Louis brokerage firm.[1] He was sentenced to 20 years' imprisonment, to be followed by five years of probation, and fined $45,000 (Pet. App. 8a-9a). The court of appeals affirmed (*id.* at 1a-34a).

1. The evidence at trial showed a scheme to loot the assets of Stix by extracting cash from ten margin accounts controlled by the conspirators. Thomas Brimberry, an employee of the brokerage firm who maintained its margin accounts, altered company records to create the appearance that the ten accounts contained various securities, when, in fact, the accounts contained few genuine securities. To deceive the firm's auditors and securities regulators, Brimberry placed forged stock certificates in the company's vault (Pet. App. 3a-4a). The conspirators withdrew funds from the firm by borrowing up to the margin limit on the strength of the supposed equity in the securities.[2] Between 1975, when the fraud began, and 1981, when it was discovered, more than $40 million of counterfeit securities were credited

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[1]Petitioner was convicted on one count of conspiracy, in violation of 18 U.S.C. 371; twelve counts of mail fraud, in violation of 18 U.S.C. 1341; six counts of wire fraud, in violation of 18 U.S.C. 1343; five counts of securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff; and five counts of making false entries in securities records, in violation of 15 U.S.C. 78q(a)(1) and 78ff.

Petitioner's co-defendant Duane Skinner was also convicted on all counts with which he was charged (Pet. App. 2a). Co-defendant Arthur Miller pleaded guilty (Pet. App. 9a n.2). The indictment also named Thomas Brimberry, Janice Brimberry, and Jerry Maeras as unindicted co-conspirators.

[2]Margin limits govern the portion of a customer's securities purchase that a brokerage firm may finance. See generally Section 7 of the Securities Exchange Act of 1934, 15 U.S.C. 78g. At the times relevant to this case, brokerage firm customers had to maintain a 50% equity in their accounts (II Tr. 34). As a result, whenever Brimberry falsely recorded the receipt of a security, the account holder could borrow in cash from the firm one half of that security's value.

to the conspirators' margin accounts (X Tr. 10), and Stix was defrauded of approximately $24 million.[3]

As the number of forged securities and the amounts stolen grew, so did the risk of discovery. Therefore, in 1979 and 1980 the conspirators bought stock in the firm from three individuals and from the company itself with the embezzled money — eventually acquiring a 60% interest (Pet. App. 5a). The stock purchases allowed the conspirators to control the firm's board of directors and to promote Brimberry to a position in which he could control the firm's margin accounts yet remain virtually immune from supervision by the company's management (IV Tr. 22-23, 194-195; V Tr. 55-58).

The withdrawal of such enormous sums from the firm threatened to place Stix in violation of the net capital requirements of the Securities Exchange Act.[4] To alleviate this problem, the conspirators used embezzled funds to extend subordinated loans to Stix — loans that Securities and Exchange Commission rules permit a firm to count as part of its net capital (IV Tr. 124). The conspirators extended one loan in petitioner's name and two in the names of fictitious trusts (*id.* at 125), thus preventing Stix from learning that the funds came from the margin accounts (see V Tr. 36-37, 41, 44-45). The conspirators obtained interest from Stix on the loans, and could embezzle the principal again.

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[3]This included $16 million cash withdrawn from the accounts, together with approximately $8 million in unpaid interest owed by the conspirators on the funds borrowed through the margin accounts and unpaid commissions attributable to the conspirators' securities trading.

[4]Section 15 of the Securities Exchange Act, 15 U.S.C. 78*o*, and 17 C.F.R. 240.15c3-1, govern the minimum net capital with which broker-dealers may operate.

2. Petitioner, who was Brimberry's attorney (XI Tr. 159-160), denied any knowledge that he was participating in the scheme (*e.g., id.* at 157-158). The record, however, demonstrates that he knowingly played a central role in defrauding Stix.

Petitioner held two of the fraudulent margin accounts, on which he received monthly statements (XI Tr. 211). These accounts, from which petitioner withdrew $2.5 million, ultimately contained $7.1 million in counterfeit securities.[5] Petitioner admits he did not have the resources to pay for such securities. He claims, rather, that he believed that Brimberry, the margin clerk, was independently wealthy and loaned or gave him the securities out of friendship (*e.g.*, XII Tr. 3-4). Petitioner kept approximately $1 million (X Tr. [redacted]-182), and an additional $1.4 million of the money was used to buy stock in, or make loans to, Stix. Petitioner also acted as a conduit for approximately $5.2 million of the stolen funds (*id.* at 179-180), most of which passed to other conspirators or into business ventures set up by the conspirators.

Petitioner was instrumental in arranging the subordinated loans extended by the conspirators to Stix in furtherance of the scheme. As noted, he served as the lender on one of the loans; he also served as "trustee" for the fictitious trusts in whose names the conspirators made the other loans (Pet. App. 4a-5a). He helped to prepare false loan documents (XI Tr. 190-191), and personally misled Stix management to conceal the true source of the funds for the

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[5]Petitioner states (Pet. 5) that he, unlike others who opened the fraudulent margin accounts, had deposited "legitimate" money in one of his accounts. That money, however, amounted to little more than $60,000 out of a final account purportedly containing $7.1 million in securities (X Tr. 29).

loans.[6] He received the interest checks on the loans, pocketing substantial amounts of the loan interest and disbursing other interest payments to his co-conspirators.[7]

Petitioner incorporated, held stock in, became an officer of, or acted as corporate counsel for most of the businesses through which the conspirators funneled the money stolen from Stix (Pet. App. 6a). He also bought Stix stock with embezzled funds, falsely telling Stix's management that he was using his own money for the purchases. These purchases eventually made petitioner the majority shareholder, and he placed himself and Brimberry on the board of directors. *Id.* at 5a.

Petitioner used his power as majority stockholder to facilitate the fraud. He promoted Brimberry to vice-president in charge of the firm's operations (IV Tr.

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[6]Petitioner told Stix officers that the beneficiary on one of the lending trusts — Alma E. Shaw, who was actually the wife of co-conspirator Jerry Maeras — was a well-to-do person (VI Tr. 39-40), a statement that he knew was false (XI Tr. 190). When Stix officials asked petitioner for copies of the trust documents relating to another subordinated loan under the name of Helen Kamadulski, the maiden name of Brimberry's mother-in-law, petitioner prepared papers designating the fictitious "January Management Corporation" as settlor. Petitioner induced his legal secretary, over her objections, to sign the papers as secretary of the nonexistent company (VII Tr. 63-64).

[7]Petitioner received $101,000 in interest from the Kamadulski trust loan. He deposited the checks to his personal account rather than a trust account, and spent the money (XI Tr. 197). Petitioner claims that he was crediting the money to unpaid legal fees owed by Brimberry (Pet. 6).

Petitioner also received the income from the Alma E. Shaw loan and turned the checks over to co-conspirator Jerry Maeras, who in turn split the money with Brimberry (VII Tr. 60-62; VI Tr. 59). When Maeras filed accurate tax forms with respect to income from the loan, petitioner and Brimberry both became angry (VI Tr. 65-67). Petitioner obviously understood that the income from the loan was intended to be concealed.

22-23).[8] When the firm's chief financial officer complained that this promotion, combined with Brimberry's responsibility at the same time as a stockbroker for the ten margin accounts, would weaken the firm's internal accounting controls, petitioner dismissed the complaint (*id.* at 193-194). Petitioner threatened to fire any Stix employee who circumvented Brimberry's authority by taking operational problems to the president or the board of directors (IV Tr. 28-30).[9]

Petitioner also helped Brimberry, who "began to exhibit a more lavish lifestyle" in 1978 (Pet. App. 6a), protect himself from discovery by the Internal Revenue Service. A $250,000 loan from petitioner to Brimberry was arranged using stolen funds, so that Brimberry could explain how he could afford the expensive home he was building (*ibid.*).

3. The case against petitioner rested on documentary evidence of the fraud and on the testimony of Stix employees, petitioner's secretary, and other conspirators.[10] The organizer of the fraud, Thomas Brimberry, did not

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[8]This operational control allowed Brimberry to convert customer securities to cash by pledging them, and to prevent the firm from attempting to lend or pledge the bogus securities (V Tr. 64-67). Further, when a firm employee brought to the attention of Brimberry and petitioner complaints that the firm's auditors were concerned about inadequate segregation of customers' fully-paid securities, petitioner suggested firing the auditors (V Tr. 171).

[9]On one of the first occasions that petitioner intervened in Stix management, he sponsored a motion at a shareholders meeting to remove both the firm's corporate counsel and the firm's chief financial officer from the board of directors (IV Tr. 17-19). When the motion passed, several shareholders tendered back their stock, which petitioner bought (*id.* at 180-182). Although petitioner eventually allowed the chief financial officer to rejoin the board, petitioner had by then freed Brimberry from any supervision (see *id.* at 29; V Tr. 56-58).

[10]Three co-conspirators, Janice Brimberry, Arthur Miller, and Jerry Maeras, testified.

testify. Although he had entered into a plea bargain with the government, he had not given correct information to the grand jury, and the prosecution did not call him to testify at trial (XIII Tr. 31-32 stipulation).[11] In several instances, the co-conspirators who testified recounted details of the scheme that Brimberry had confided to them (see Pet. 16-18). Before admitting these out-of-court statements by Brimberry the trial court determined preliminarily (II Tr. 73-80) that they qualified for admission as co-conspirator statements under Fed. R. Evid. 801(d)(2)(E).[12] The court rejected petitioner's argument that admission of the statements would violate his Sixth Amendment right to confront Brimberry (XI Tr. 27-29).

Petitioner testified and denied having any knowledge of the looting scheme, contending that Brimberry had fooled him just as he fooled others. Before instructing the jury, the court overruled petitioner's objection to a "willful blindness" charge (XII Tr. 161). Under that instruction, the jury could infer knowledge of the fraud if it found that petitioner "deliberately closed his eyes" to the facts.[13]

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[11]Brimberry faced perjury and obstruction of justice charges at the time of petitioner's trial. See *United States* v. *Brimberry*, 744 F.2d 580 (7th Cir. 1984).

[12]Rule 801(d)(2)(E) provides:

> (d) *Statements which are not hearsay.* A statement is not hearsay if —
>
> (2) Admission by party-opponent. The statement is offered against a party and is * * * (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

[13]Charge 65 provided:

> The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him. A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment

Following the 14-day trial, the jury returned a verdict of guilty on all counts.

4. The court of appeals affirmed. It considered and rejected petitioner's argument that the admission of Brimberry's out-of-court statements was reversible error (Pet. App. 18a-20a). It also held that the district court had not erred in giving the "willful blindness" instructions (*id.* at 23a-25a).

With regard to Brimberry's out-of-court statements, the court first determined that they were admissible under Rule 801(d)(2)(E). Petitioner had argued that they were not admissible against him because there was insufficient independent evidence that he was part of the conspiracy. The court of appeals disagreed: "Documentary evidence and stipulations showed that $7 million worth of securities in Massa's accounts were fraudulent, that Massa obtained $2.5 million of Stix's money for his own use, and that Massa used money withdrawn from the Stix margin accounts to buy a controlling interest in Stix" (Pet. App. 14a). This evidence, "together with testimony linking Massa to the fraudulent subordinated loans" (*ibid.*), was sufficient independent evidence of petitioner's role in the fraud.

The court went on to consider whether the admission of Brimberry's statements nevertheless violated the Confrontation Clause. The court expressly determined not to decide this issue. Instead, it held that "any error was harmless beyond a reasonable doubt" (Pet. App. 18a-19a).

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would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from willful blindness to the existence of a fact.

It is entirely up to you as to whether you find any deliberate closing of the eyes, and the inferences to be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge.

On the "willful blindness" charge, petitioner had argued to the court of appeals that such a charge permitted a jury to convict without finding subjective knowledge of wrongdoing by petitioner. The court of appeals rejected that argument, noting, first, that a number of circuits had approved the use of the instruction, which permits a jury to infer the element of knowledge from deliberate indifference (Pet. App. 24a). Second, viewing the instructions as a whole, the court concluded that the jury could not have been misled by the instruction as petitioner had argued (*id.* at 24a-25a and n.8).

ARGUMENT

1. Petitioner contends that the court of appeals applied an improper legal standard when it ruled that any error in admitting Brimberry's out-of-court statements was harmless beyond a reasonable doubt (Pet. App. 18a-19a).[14]

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[14]There is a conflict among the circuits on whether, when the traditional requirements for admission of co-conspirator declarations are satisfied, the Confrontation Clause nevertheless imposes additional conditions that must be satisfied before the evidence may be admitted. Specifically, the cases conflict on whether statements made in the course of and in furtherance of a conspiracy to which the defendant has been connected by the requisite quantum of independent evidence must in addition be shown to satisfy some independent test of reliability and whether as a precondition to admission of such evidence the prosecution must establish the unavailability of the declarant. Compare *United States* v. *Inadi*, 748 F.2d 812 (3d Cir. 1984); *United States* v. *Ordonez*, 737 F.2d 793 (9th Cir. 1983); *United States* v. *Ammar*, 714 F.2d 238, 254-257 (3d Cir. 1983), cert. denied, 464 U.S. 936 (1983); *United States* v. *Wright*, 588 F.2d 31, 37-38 (2d Cir. 1978), cert. denied, 440 U.S. 917 (1979); *United States* v. *Kelley*, 526 F.2d 615, 620-621 (8th Cir. 1975), cert. denied, 424 U.S. 971 (1976); and *United States* v. *Snow*, 521 F.2d 730, 734 (9th Cir. 1975), cert. denied, 423 U.S. 1090 (1976) with *United States* v. *Lurz*, 666 F.2d 69, 80-81 (4th Cir. 1981), certs. denied, 455 U.S. 1005 and 457 U.S. 1136 (1982); *United States* v. *Kendall*, 665 F.2d 126, 133 (7th Cir. 1981), cert. denied, 455 U.S. 1021 (1982); *United States* v. *Peacock*, 654 F.2d 339 (5th Cir. 1981), cert. denied, 464 U.S. 965 (1983); *United States* v. *Burroughs*, 650 F.2d 595, 597 n.3 (5th

Petitioner argues that the court "made no effort to evaluate the impact of the erroneously admitted evidence on the jury," as required by decisions of this Court, but rather "satisfied itself" that there was other evidence linking petitioner to the conspiracy (Pet. 14). This contention is meritless. The court of appeals applied settled law in finding harmless error; petitioner merely contests its factual analysis, review of which is not warranted.

A reviewing court should find an error harmless whenever review of the whole record makes it clear beyond a reasonable doubt that an average jury would have returned a verdict of guilty regardless of the error. See *United States* v. *Hasting*, 461 U.S. 499, 510-511 (1983); see also *Harrington* v. *California*, 395 U.S. 250, 254 (1969); *Schneble* v. *Florida*, 405 U.S. 427, 432 (1972); *Chapman* v. *California*, 386 U.S. 18, 24 (1967); *Kotteakos* v. *United States*, 328 U.S. 750, 763-764 (1946). While the court of appeals did not expressly state that it had assessed the record from the perspective of a jury (see Pet. App. 14a-15a), that omission is a matter of form, not substance. The court of appeals was

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Cir.), cert. denied, 454 U.S. 1037 (1981); *United States* v. *Papia*, 560 F.2d 827, 836 n.3 (7th Cir. 1977); and *Ottomano* v. *United States*, 468 F.2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973). The court below appears to have aligned itself with those circuits that do subject co-conspirator declarations to some form of independent scrutiny under the Confrontation Clause (see Pet. App. 15a-17a).

We believe the conflicting views of the circuits on these important questions deserve review by this Court in an appropriate case. Indeed, the Solicitor General has authorized the filing of a petition for a writ of certiorari in *United States* v. *Inadi, supra*, in which the court of appeals reversed a conviction on the ground that the prosecution had failed satisfactorily to establish the unavailability of the co-conspirator whose statements were admitted at trial. Because the decision in this case does not rest upon a holding adverse to petitioner on these questions, but rather upon the conclusion that any error in admission of Brimberry's statements was harmless, this is not a suitable vehicle for resolution of the conflict.

fully cognizant of the correct standard; it explicitly relied on the *Hasting, Harrington,* and *Schneble* decisions in holding the admission of the statements "harmless beyond a reasonable doubt" (Pet. App. 19a).

Following the dictate of those cases, the court of appeals reviewed the trial record, and determined that the admission of the statements, when viewed in the context of the whole record, had not prejudiced petitioner's case (Pet. App. 19a-20a). The court found that, with one exception, the statements concerned matters that were not disputed and were established by other evidence, and thus "were not harmful" to petitioner's defense (*ibid.*).[15] It held that the one exception — in which co-conspirator Miller testified that Brimberry warned him that exposure of the scheme would get petitioner in trouble — "[w]hen viewed in the context of all of the evidence tying Massa to the Stix fraud and to the other conspirators, * * * is hardly damaging enough to require reversal" (Pet. App. 18a-19a).

In evaluating how Brimberry's statements might have affected an average jury, all that the court of appeals could do was determine how strong was the remainder of the evidence presented to the jury, and how significant was the allegedly inadmissible evidence in light of the whole record.[16] In fact, petitioner agrees that "[i]n evaluating the impact improperly admitted evidence has on the mind of the jury,

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[15]The court also noted that some of the statements were not even admitted to prove their truth, but for other reasons (Pet. App. 20a).

[16]Petitioner's only claim of prejudice is that the statements swayed the jury because they were "damning evidence" of his participation in the conspiracy (Pet. 16). Petitioner does not claim that the statements were inflammatory or otherwise unfairly prejudiced the jury. Thus, in evaluating the effect of the statements on an average jury, the court of appeals could consider only how strong the statements were as evidence and how strong the remaining evidence was.

this Court always has compared the quality of the remaining evidence in the record with the effects of the constitutional violation" (Pet. 15).[17] That is exactly what the court of appeals did. Petitioner essentially contends that the court incorrectly assessed the strength of the prosecution's case,[18] and asks this Court to reexamine a record that the lower court has already combed. Review of such a question is not warranted.[19]

2. In its "willful blindness" instruction, the district court instructed the jury that it could infer that petitioner knew of the fraudulent nature of the scheme if it found that he "deliberately closed his eyes to what would otherwise have been obvious to him" and showed "a conscious purpose to

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[17]See, *e.g.*, *United States* v. *Hasting*, 461 U.S. at 511-512; *Harrington* v. *California*, 395 U.S. at 254.

[18]Petitioner appears to argue that because the case against him was based on circumstantial evidence, the improper admission of any evidence is *per se* reversible error (Pet. 15-16). Such a rule would be totally without basis. The mere labeling of evidence as "circumstantial" or "direct" says little about its strength. Many cases built solely on circumstantial evidence are as strong as direct cases, and there is no basis for treating them differently for purposes of assessing harmless error. See *Holland* v. *United States*, 348 U.S. 121, 139-140 (1954). See also *Herman & McLean* v. *Huddleston*, 459 U.S. 375, 390 n.30 (1983) (circumstantial evidence is "more than sufficient" to prove scienter in fraud cases). Petitioner also suggests (Pet. 16) that the circumstantial evidence in this case was weak, stating that the government "conceded" in the court of appeals that the case against petitioner "was strictly 'circumstantial'." In fact, what the government said was "that the evidence connecting Massa to this conspiracy, although circumstantial, is overwhelming" (Appellee's Br. 18).

[19]This Court has often observed that questions of evidentiary sufficiency are chiefly the responsibility of the courts of appeals. *E.g.*, *Hamling* v. *United States*, 418 U.S. 87, 124 (1974). In this case, petitioner presses for a review of the evidence that is analogous to review of evidentiary sufficiency. That task is equally a matter for the courts of appeals. See *United States* v. *Hasting*, 461 U.S. 499, 516-517 (1983) (Stevens, J., concurring).

avoid enlightenment" (see note 13, *supra*). Petitioner asserts (Pet. 21) that a court cannot so instruct a jury unless it "balances" the instruction by: (1) stating that the defendant must have been aware of the "high probability" of the fraud; and (2) emphasizing that the jury cannot convict if the defendant acted in good faith without knowledge of the fraud. Petitioner contends that the circuits have split on whether a trial court must use this additional language (Pet. 19-23). In fact, no conflict exists over a court's obligation to use such language where, as here, it was not requested at trial. In addition, petitioner was not prejudiced by the omission of the specific language he now requests. Thus, further review is not warranted.

Petitioner did not ask the district court to instruct the jury in the terms he now urges.[20] Accordingly, petitioner must establish "plain error" within the meaning of Fed. R. Crim. P. 52(b). See Fed. R. Crim. P. 30. No court has held that failure to instruct in the terms that petitioner now embraces would constitute plain error. To the contrary, those courts of appeals that have considered the question have explicitly stated that the failure to include such language in a "willful blindness" instruction does not constitute plain error. *United States* v. *Glick*, 710 F.2d 639, 642-644 (10th Cir. 1983), cert. denied, No. 83-454 (Jan. 23, 1984); *United States* v. *Cincotta*, 689 F.2d 238, 243-244 (1st Cir.), cert. denied, 459 U.S. 991 (1982); *United States* v. *Dozier*, 522 F.2d 224, 228 (2d Cir.) (on petition for rehearing), cert. denied, 423 U.S. 1021 (1975); see *United States*

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[20]At trial, petitioner objected generally to the charge; he did not propose "balancing" language or object to its absence (XII Tr. 161). Indeed, petitioner's brief in the court of appeals mentioned the "willful blindness" instruction only in a footnote. Appellant's Br. 54 n.2. Petitioner's first mention of "balancing" language came, not in the district court, but in his reply brief in the court of appeals. Appellant's Reply Br. 8 & n.2.

v. *Suttiswad,* 696 F.2d 645, 651-652 (9th Cir. 1982). Thus the courts of appeals are not in conflict on this issue.[21]

Moreover, the absence of the proposed language did not prejudice petitioner because the charge given by the district court was not unbalanced. Evaluating a challenge to the wording of a particular jury instruction necessarily requires review of the charge as a whole. *Cupp* v. *Naughten,* 414 U.S. 141, 146-147 (1973). Here, the district court instructed the jury that the evidence must demonstrate "that the defendant knowingly did an act which the law forbids, purposely intending to violate the law," before the jury could find petitioner guilty (Pet. App. 25a n.8). The willful blindness charge itself explicitly informed the jury that "[a] showing of negligence or mistake is not sufficient to support

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[21]The Second Circuit did not hold otherwise in *United States* v. *Bright,* 517 F.2d 584 (1975), the case petitioner primarily relies upon in claiming that a conflict exists (Pet. 20). In that case the jury, while deliberating, requested clarification concerning the meaning of "reckless disregard" in an instruction stating that the defendant could be found guilty if she acted with reckless disregard as to whether the checks she cashed had been stolen. Defense counsel specifically requested that the court not merely repeat the portion of its prior charge containing the phrase "reckless disregard," but include balancing language as well. The court, however, instead simply repeated what defense counsel termed the "most damning part" of its charge without adding any balancing language (517 F.2d at 588). In light of the lack of balance on the reinstruction, and "counsel's acute objections on the very point" (*ibid.*), the court found error. Thus, far from finding plain error in a "willful blindness" charge, the court in *Bright* held that the district court erred by refusing to balance its clarifying instruction when asked to do so.

The Second Circuit, shortly after *Bright,* made clear that the omission of balancing language is not plain error (*United States* v. *Dozier, supra*). The other Second Circuit cases cited by petitioner (Pet. 21-22) do not show any conflict. In *United States* v. *Aulet,* 618 F.2d 182, 190-191 (2d Cir. 1980), the court affirmed a conviction, finding that the challenged charge contained all the required elements. In *United States* v. *Shareef,* 714 F.2d 232, 234 (2d Cir. 1983), the court found that the absence of balancing language was harmless.

a finding of willfulness or knowledge" (see note 13, *supra*). On three other occasions, as the court of appeals noted, the district court emphasized that the jury could not convict on the basis of "mistake or accident or other innocent reason" (Pet. App. 25a n.8). Thus, the charge expressly required the jury to find actual knowledge. Viewed in the context of the entire charge, the "willful blindness" instruction presented no genuine danger that the jury would convict petitioner on the basis of either negligence or recklessness.[22]

3. For the first time before this Court, petitioner argues that his conviction for securities fraud cannot stand because the scheme did not involve the purchase or sale of a "security" (Pet. 23-27). Petitioner urges the Court to disregard his five separate purchases of Stix stock, insisting that the fraudulent purchases did not, in "economic reality," involve securities because the transactions cumulatively gave him control over Stix. Under the "sale-of-business" doctrine, petitioner maintains, the indictment did not state an offense under the securities laws (Pet. 24-26).

Petitioner's admitted failure previously to raise this issue (Pet. 26) alone renders it inappropriate for review. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). Petitioner attempts to excuse this failure by relying on the provisions

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[22]Every court of appeals that has considered instructions on "willful blindness," "conscious avoidance," or "deliberate ignorance" has rejected the notion that such instructions invite juries to convict on a showing of mere negligence. *United States* v. *DeVeau*, 734 F.2d 1023, 1028 (5th Cir. 1984), cert. denied, No. 84-549 (Jan. 14, 1985); *United States* v. *Gullett*, 713 F.2d 1203, 1212 (6th Cir. 1983), cert. denied, No. 83-432 (Jan. 16, 1984); *United States* v. *Petullo*, 709 F.2d 1178, 1181 (7th Cir. 1983); *United States* v. *Kershman*, 555 F.2d 198, 200-201 (8th Cir.), cert. denied, 434 U.S. 892 (1977); *United States* v. *Joyce*, 542 F.2d 158, 161 (2d Cir. 1976), cert. denied, 429 U.S. 1100 (1977); *United States* v. *Jewell*, 532 F.2d 697, 704 & n.21 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1976); *Griego* v. *United States*, 298 F.2d 845, 849 (10th Cir. 1962).

of Fed. R. Crim. 12(b)(2), which states that the failure of an indictment to charge an offense cannot be waived.[23] To be insufficient, however, an indictment not timely challenged must be "so defective that it does not, by any reasonable construction, state an offense." *United States* v. *Knippenberg,* 502 F.2d 1056, 1061 (7th Cir. 1974). See also *Hagner* v. *United States,* 285 U.S. 427, 433 (1932).[24] The present indictment identified the provision of the United States Code violated, the securities that were the subject of the fraud, and the particular misrepresentations made in connection with the purchases, and it alleged the use of the jurisdictional instrumentalities (Indictment, Counts 30-34 ¶¶ 1-3 (incorporating by reference Count 1, ¶¶ 8.F.1 - 8.F.3, 8.F.8 - 8.F.10 and 8.F.28 - 8.F.33)). No more was required. The indictment certainly need not have negated every construction of the facts under which the instruments in question were not securities.

In any event, the sale of business doctrine does not apply in the circumstances presented here. Those courts that have adopted the sale of business doctrine have held that a transaction in which the parties buy and sell control of a business and merely use stock as "the vehicle of transfer" does

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[23]Petitioner's additional contention — that the failure of the court below to consider the sale of business doctrine was plain error under Fed. R. Crim. P. 52(b) — is essentially redundant to his argument under Fed. R. Crim. P. 12(b)(2). In either event, he must argue that the indictment did not state an offense (see Pet. 26).

[24]While a defendant may raise the failure of an indictment to charge an offense at any time, tardily invoking the issue permits the reviewing court to construe the indictment liberally in the prosecution's favor. *E.g., United States* v. *Richardson,* 687 F.2d 952, 965 (7th Cir. 1982); *United States* v. *Previte,* 648 F.2d 73, 80 (1st Cir. 1981). The indictment must so fail to alert a defendant to the nature of the acts charged that (1) he cannot prepare a defense; and (2) a reviewing court could not determine what other offenses would, in the event of trial, be barred by double jeopardy. *Hamling* v. *United States,* 418 U.S. 87, 117 (1974).

not involve a sale of securities. *King* v. *Winkler*, 673 F.2d 342, 346 (11th Cir. 1982); see *Fredericksen* v. *Poloway*, 637 F.2d 1147, 1151-1152 (7th Cir.), cert. denied, 451 U.S. 1017 (1981).[25] The doctrine, however, does not apply when a buyer fraudulently acquires control from a number of sellers, each of whom is not selling "control." *McGrath* v. *Zenith Radio Corp.*, 651 F.2d 458, 467-468 n.5 (7th Cir.), cert. denied, 454 U.S. 1017 (1981). Each sale in the present case transferred stock, not control. Petitioner obtained a controlling interest in Stix only following a series of five purchases during two years from three different persons and from the Stix treasury. No single purchase independently conferred a controlling block,[26] and at least two of the

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[25]The doctrine posits that the common stock of an ordinary business corporation does not constitute a security unless the transaction essentially consists of: (1) an investment in a common venture; (2) premised on a reasonable expectation of profits; (3) to be derived from the managerial or entrepreneurial efforts of others. *Canfield* v. *Rapp & Son*, 654 F.2d 459, 463 (7th Cir. 1981) (citing *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 852 (1975)). Courts that have embraced the doctrine have concluded that an investor who purchases control of the corporation does not intend to derive his profits from the efforts of others. *E.g.*, *Fredericksen* v. *Poloway*, 637 F.2d 1147, 1151-1153 (7th Cir.), cert. denied, 451 U.S. 1017 (1981). In November 1984, this Court granted certiorari in two cases involving the sale of business doctrine, *Landreth Timber Company* v. *Landreth*, 731 F.2d 1348 (9th Cir.) (adopting the doctrine), cert. granted, No. 83-1961 (Nov. 13, 1984), and *Ruefenacht* v. *O'Halloran*, 737 F.2d 320 (3d Cir.) (rejecting the doctrine), cert. granted, No. 84-165 (Nov. 13, 1984). The Securities and Exchange Commission has filed briefs amicus curiae in those cases urging the Court to reject the sale of business doctrine. Even if that doctrine were valid, however, it clearly would not reach the instant transactions for the reasons given in text and in note 27. Accordingly, there is no reason to hold this case pending those decisions.

[26]Petitioner ultimately obtained a 60% interest consisting of more than 25,000 shares. His first purchase of 2500 shares therefore presumably comprised less than 10% of the stock. His second and third purchases, each of 10,000 shares, comprised less than 30% each (IV Tr. 12-13, 15-16, 105-107, 175-177, 181-182). The remaining two purchases combined equalled only 820 shares (IV Tr. 105, 182).

sellers sold their stock not to confer control, but specifically because they disagreed with corporate policies initiated by petitioner (IV Tr. 105-107, 181-182). Were the sale-of-business doctrine applicable to such seriatim purchases, a purchaser of securities could insulate himself from the securities laws simply by assuring that his fraudulent purchases — whether on the open market, by tender offer, or otherwise — combined to vest him with corporate control. No court has so held.[27]

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[27]In addition, courts adopting the sale of business doctrine have held that, where a buyer obtains a substantial interest in a company but the parties intend that the buyer will allow others to manage the enterprise, the federal securities laws govern. See, generally, *Sutter* v. *Groen*, 687 F.2d 197, 201-204 (7th Cir. 1982) (proposing standards to distinguish "entrepreneurial" transactions from investments). The parties here did not contemplate that petitioner would manage Stix. Indeed, petitioner had specifically represented to officers of Stix at the time of his earliest purchase that he wished only to *invest* in Stix (IV Tr. 8-10, 176) and that "his function on the board [of directors] would be as a passive director, who would listen and not necessarily initiate any activity as far as the firm was concerned" (IV Tr. 13).

CONCLUSION

The petition for a writ of certiorari should denied.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

JAMES MASSA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR PETITIONER IN SUPPORT

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REPLY BRIEF FOR PETITIONER IN SUPPORT

Petitioner respectfully submits this brief in reply to respondent's brief in opposition.

1. Petitioner disputes the characterization of the record set forth in respondent's brief (Opp. 1-9) and refers this Court to his Statement of the Case (Pet. 2-11).

2. Respondent acknowledges that a reviewing court must make its determination of whether error is harmless based upon the effect that the error may have had on the jury, and not based upon its view of the defendant's guilt

or innocence (Opp. 14). Respondent concedes that "the court of appeals did not expressly state that it had assessed the record from the perspective of a jury" (Opp. 14). Respondent's attempt to characterize this error as "a matter of form, not substance" is not successful (Opp. 14).

The court of appeals did no more than assess the cold record to determine whether it contained sufficient evidence, absent the testimony admitted in violation of the Confrontation Clause, to sustain the finding of guilt (Pet. 19a-20a). Nowhere does the court below weigh any of the factors that may have influenced the jury in reaching its verdict. For example, the court simply ignored the fact that the objectionable out-of-court statements purportedly came from Brimberry, who never testified yet was the acknowledged mastermind and the only person who would know whether petitioner knowingly participated in the scheme. Similarly, the court ignored the fact that Brimberry's uncross-examined statements provided the only arguably direct evidence in the case.* Most important, the court of appeals ignored the trial court's assessment of the Government's case at trial. The district judge, who viewed the Government's witnesses and heard their live testimony with the jury, stated that the evidence of guilt—even *with* the improper evidence—was not very strong (11 Tr. 28).

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* Petitioner does *not* argue, as respondent suggests, for a per se rule that the admission of improper evidence requires reversal of all convictions based solely on circumstantial evidence (Opp. 12 n.18). However, this Court's harmless error opinions, from *Chapman* v. *California*, 386 U.S. 18, 25-26 (1967) through *United States* v. *Hasting*, 461 U.S. 499, 511 (1983), all note the presence of strong direct evidence when they affirm convictions (*See* Pet. 15-16). While circumstantial evidence could be of sufficient strength to justify a conclusion of harmless error, it is not in this case, as the trial court noted (11 Tr. 28).

The appellate court's belief that the improper evidence was "hardly damaging enough to require reversal" (Pet. 19a) therefore is *not* the same in substance as a conclusion that that evidence did not influence the jury in reaching its verdict. As this Court held in *United States* v. *Agurs*, 427 U.S. 97, 112 (1976), "when error is present in the record, the reviewing judge must set aside the verdict and judgment unless his 'conviction is sure that the error did not influence the jury, or had but very slight effect.' *Kotteakos* v. *United States*, 328 U.S. 750, 764." This Court should issue a Writ of Certiorari because the opinion below is in direct conflict with the stringent harmless error standard set forth in *Kotteakos*, *Agurs*, and the other harmless error decisions of this Court.*

3. Respondent all but concedes that the appellate court's approval of the use of the unbalanced "willful blindness" instruction conflicts directly with the Second Circuit's decision in *United States* v. *Bright*, 517 F.2d 584 (2d Cir. 1975). Indeed, the only argument that respondent can muster on the merits is that the willful blindness instruction used below is acceptable when viewed in the "charge as a whole" (Opp. 14-15). However, this argument does not avoid the conflict between these circuits because the *Bright* court addressed this very question and reversed despite the use of another instruction that correctly set forth the "knowledge" requirement of the relevant offense, possession of stolen mail. It was "the lack of juxtaposition of the choices available in a balanced way [that] was fatally

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* Petitioner is mindful of the limit on the time this Court can devote to the review of an evidentiary record. This limit, however, does not mitigate against issuing the writ here, because the question presented addresses the standard used below. After plenary review, if this Court concludes that the court of appeals applied an incorrect standard, it can remand the case to the court of appeals for reconsideration under the correct standard.

erroneous. . . .'' 517 F.2d at 588. The need for a juxtaposed balance was particularly acute below, where the crimes alleged were far more complex and the ''charge as a whole'' included more than 70 separate instructions.

Respondent seeks to avoid review on the merits by persuading this Court that the issue presented is one of plain error because petitioner failed to object properly at the trial (Opp. 12-13). This is not so. Petitioner objected to the willful blindness instruction before the trial court charged the jury, and thus gave the court an opportunity to correct its error (12 Tr. 161). Furthermore, petitioner tendered his Requested Instruction A, which would have obviated the need for the balancing language if the district court had accepted it in lieu of the willful blindness instruction.* However, the trial court rejected Instruction A at the same time it overruled petitioner's objections to the willful blindness instruction (12 Tr. 161). Finally, the court of appeals addressed the propriety of the willful blindness instruction below even though respondent had made the same argument to avoid the merits (Pet. 23a-26a). The conflict between the court of appeals below and the Second Circuit is therefore squarely presented, and this Court should issue a Writ of Certiorari to address this issue.

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* Requested Instruction A read:

Actual knowledge that defendant Massa knew fictitious security positions were created in his Stix customer accounts is an essential element of the offenses charged in Counts Two through Thirteen, 23 through 28 and 30 through 40. You may not find defendant Massa guilty unless you find beyond reasonable doubt that he knew fictitious security positions were created in his Stix customer accounts.

The fact of knowledge, however, may be established by direct or circumstantial evidence just as any other fact in the case.

4. Respondent's effort to avoid the issue whether the "sale-of-business" doctrine applies to criminal prosecutions under the securities laws is without substance. Respondent does not dispute that "the right to be free of prosecution under an indictment that fails to charge an offense is a substantial right" and that conviction under such an indictment is plain error. *United States* v. *Meacham*, 626 F.2d 503, 509 (5th Cir. 1980). See Federal Rules of Criminal Procedure 12(b)(2) and 52(b). Respondent's cases are all inapposite; they address either technical defects in indictments* or the issue whether the indictment provided adequate notice of the offense charged.** None of respondent's cases address the situation presented here, where the very language of the indictment demonstrates that the alleged acts fall outside the scope of the statutory offense.

Respondent implicitly concedes that the sale-of-business issue is worthy of this Court's review by addressing the merits of the issue rather than contesting its significance. Citing only to a footnote in one appellate court opinion, *McGrath* v. *Zenith Radio Corp.*, 651 F.2d 458, 467-68 n.5 (7th Cir.), *cert. denied*, 454 U.S. 835 (1981), respondent contends that the sale-of-business doctrine should not apply here because petitioner allegedly acquired control of Stix as a result of 5 purchases from 3 people (Opp. 16-18).

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* *United States* v. *Knippenberg*, 502 F.2d 1056 (7th Cir. 1974) (omission of the word "willfully"); *Hagner* v. *United States*, 285 U.S. 427 (1932) (omission from one paragraph of the phrase "to be sent or delivered by the post office establishment" where the indictment made that allegation sufficiently in another paragraph).

** *Hamling* v. *United States*, 418 U.S. 87 (1974); *United States* v. *Richardson*, 687 F.2d 952 (7th Cir. 1982); *United States* v. *Previte*, 648 F.2d 73 (1st Cir. 1981).

Under the "economic realities" test, however, *McGrath* is inapposite because it involved many people selling small numbers of shares. In contrast, petitioner acquired his controlling interest by purchasing more than 50% of Stix's stock from its treasury, upon votes of the directors, and the rest of his interest from two Stix directors and the head of a Stix subsidiary (4 Tr. 12-16, 105-07, 175-82). Courts have applied the sale-of-business doctrine in similar multiple-seller cases. *E.g., Canfield* v. *Rapp & Son, Inc.*, 654 F.2d 459 (7th Cir. 1981). That petitioner acquired control through more than one purchase is likewise irrelevant under the economic realities test. The indictment itself specifically alleges that petitioner intended to and did acquire and exercise control of Stix.* Indictment, Counts 30-34 incorporating Count I ¶¶ 8.F. 28-33. Therefore, if the sale-of-business doctrine is valid law, the indictment cannot stand.

At the very least, respondent's brief establishes that this issue is both novel and important. This Court should issue a Writ of Certiorari to address the applicability and scope of the sale-of-business doctrine in a criminal case.

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* The references to trial testimony in respondent's concluding paragraph and footnote (Opp. 16-18 & n. 27) are irrelevant to the issue at hand: whether, under the sale-of-business doctrine, the indictment charges violations of the securities laws.